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An Agricultural Law Research Article

**High Steaks: Defending North Carolina's
Response to Contagious Animal Diseases**

by

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INTRODUCTION

Salus Populi Suprema Lex: The Public Welfare is the Highest Law¹

On December 23, 2003, the first American case of “Mad Cow” Disease (“MCD”) was discovered in Washington state.² The economic impact was immediate and drastic.³ Contrasted with the economic consequences of an outbreak, however, the impact was small.⁴ Because of its large livestock industry, an outbreak of MCD or other contagious animal disease, such as Foot and Mouth Disease (“FMD”), could devastate North Carolina’s economy.⁵ Unconnected to the December discovery, the first American death potentially linked to MCD was discovered in June 2004.⁶ Authorities initially believed the twenty-five-year-old Florida woman contracted the human variant of MCD from eating contaminated beef in England, twelve years prior to her death.⁷ The potential catastrophic impact of an outbreak—in both economic and human terms—necessitates an aggressive containment plan for North Carolina. The recent increase in public awareness of contagious animal diseases, due primarily to the MCD scare, presents an opportunity to consider North Carolina’s approach to preventing an outbreak.

North Carolina’s elected officials and citizens were never more aware of the threat posed by contagious animal diseases than in the spring of 2001. The United Kingdom’s economy and livestock industry were reeling from ruinous FMD and MCD outbreaks.⁸ North Carolina braced for the first American, if not North Carolinian, case.⁹ In response to the potentially dire economic consequences of an outbreak and the potentially

1. State v. Hay, 126 N.C. 999, 999, 35 S.E. 459, 459 (1900).
 2. *Restaurant Shares Rally From Mad Cow Lows*, L.A. TIMES, Jan. 14, 2004, at C4 [hereinafter *Restaurant Shares*].
 3. See, e.g., George Raine, *Beef Exports in Limbo; Shipping and Trading Companies Hurt in Mad Cow Scare*, S.F. CHRON., Jan. 8, 2004, at B1 (describing the impact on the beef exportation industry). But see George Raine, *Beef Sales Up Despite Mad Cow; Wholesalers Going for Seconds of Meat as U.S. Prices Fall*, S.F. CHRON., Jan. 14, 2004, at B1 (discussing the advantage for domestic consumers and the continuing demand for beef).
 4. See *infra* Part I.C–D.
 5. See Bob Williams, *N.C. Officials Make Plans in Case Foot-and-Mouth Breaks Out in State*, NEWS & OBSERVER (Raleigh, N.C.), May 21, 2001, at A1.
 6. *Woman Dies From Mad Cow Disease*, L.A. TIMES, June 22, 2004, at A12 [hereinafter *Woman Dies*].
 7. *Id.*
 8. See *infra* Part I.D.
 9. See *infra* notes 157–61 and accompanying text.

rapid spread of FMD, the North Carolina General Assembly rushed through Senate Bill 779 (“S.B. 779”).¹⁰ S.B. 779 was introduced in both houses of the General Assembly, debated in committees and on the floor of both houses, passed by both houses, and signed by the Governor in forty-eight hours.¹¹

S.B. 779 focused on containing a contagious animal disease if one were discovered, as opposed to preventing the introduction of the disease.¹² Once a contagious disease was discovered, the bill authorized the state veterinarian, after receiving the approval of the Governor, to quarantine large areas of the state, to conduct warrantless searches and seizures of people and animals, and to destroy potentially infected animals without notifying the owner.¹³ This authorization greatly expanded the power of the state veterinarian, an unelected official, and authorized a dramatic exercise of the state’s police power.¹⁴

This Comment argues that the powers authorized by S.B. 779 are within the limits of the United State Constitution, that policy considerations justify the “triggering” provision included in S.B. 779, and that the “sunset” provision weakens the protection offered by the law. Specifically, this Comment defends the constitutionality of the three important, and controversial, police powers included in the 2001 response by introducing and assessing case law from North Carolina, the federal courts, and other states. Moreover, it compares other North Carolina statutes that authorize similar police powers with the codified version of S.B. 779. In addition, this Comment analyzes the policy rationale supporting the “triggering” provision of S.B. 779. Before the state veterinarian can exercise any of the powers allowed under S.B. 779, the Governor must agree that an “imminent threat” exists.¹⁵ This Comment defends the decision to require the Governor’s approval. Finally, it considers the “sunset provision” of S.B. 779. The state veterinarian’s powers, under the original legislation, expired in 2003.¹⁶ The day before they expired, the Governor signed a bill extending the authority for two more years.¹⁷ This Comment argues that the sunset provision was an unnecessary and potentially harmful addition to

10. See Act of Apr. 4, 2001, ch. 12, 2001 N.C. Sess. Laws 14 (codified as amended in scattered sections of N.C. GEN. STAT. § 106).

11. See *infra* Part II.A for a summary of the legislative history.

12. See Act of Apr. 4, 2001, ch. 12, 2001 N.C. Sess. Laws 14.

13. *Id.*

14. The state veterinarian is appointed by the Agriculture Commissioner. See Williams, *infra* note 79 (noting the appointment of Dr. David Marshall as state veterinarian).

15. Act of Apr. 4, 2001, ch. 12, 2001 N.C. Sess. Law 14 (codified as amended in scattered sections of N.C. GEN. STAT. § 106).

16. Act of Apr. 4, 2001, ch. 12, § 11, 2001 N.C. Sess. Laws 14, 21.

17. Act of Mar. 24, 2003, ch. 6, § 1, 2003 N.C. Sess. Laws 3, 3 (amending S.B. 779 to extend the sunset provision).

the legislation that weakens the protection offered by the other sections.

I. BACKGROUND: FOOT AND MOUTH DISEASE AND “MAD COW” DISEASE

Understanding both the nature of FMD and MCD and the potential economic impact of an outbreak is critical to understanding the threat posed by these diseases. Characteristics of both diseases make them difficult to contain and, in the case of MCD, even difficult to detect. Evidence from the 2001 United Kingdom FMD outbreak and federal estimates regarding the destructive potential of an American MCD outbreak demonstrate that FMD and MCD both pose a significant threat to the economic well-being of North Carolina.

A. *Foot and Mouth Disease*

The potential for a Foot and Mouth Disease outbreak is a serious threat to North Carolina’s livestock industry. The disease is found in cloven-hoofed (“two-toed”) animals, such as cows, pigs, and deer.¹⁸ FMD does not pose a physical threat to humans.¹⁹ The disease causes animals to develop high fevers, stop eating, produce less milk, and often prevents them from walking without pain.²⁰ Animals do not typically die from FMD, but generally experience great pain.²¹

FMD is highly communicable and can spread rapidly if not contained.²² The disease has an incubation period²³ of two to fourteen days and can affect susceptible animals at any age.²⁴ While the presence of

18. N.C. DEP’T OF AGRIC. & CONSUMER SERVS., COMPARISON OF FOOT AND MOUTH DISEASE (FMD) AND BOVINE SPONGIFORM ENCEPHALOPATHY (BSE), at <http://www.ncagr.com/vet/FMDvsBSE.htm> (last visited Nov. 29, 2004) [hereinafter N.C. CHART] (on file with the North Carolina Law Review). There are at least seven types of FMD and more than sixty subtypes. PL 107-9 FED. INTER-AGENCY WORKING GROUP, ANIMAL DISEASE RISK ASSESSMENT, PREVENTION, AND CONTROL ACT OF 2001 (PL 107-9): FINAL REPORT 3 (2003), at http://www.aphis.usda.gov/pa/pubs/pubs/PL107-9_1-03.pdf (last visited Nov. 29, 2004) [hereinafter WORKING GROUP] (on file with the North Carolina Law Review).

19. N.C. CHART, *supra* note 18.

20. *Id.*

21. *Id.*

22. *Id.*

23. The “incubation period” is the time period between the introduction of the disease and the onset of the disease/symptoms. See WORLD HEALTH ORGANIZATION, UPDATE 49—SARS CASE FATALITY RATIO, INCUBATION PERIOD (May 7, 2003), at http://www.who.int/csr/sars/archive/2003_05_07a/en/ (last visited Nov. 29, 2004) (providing general lay definition of “incubation period”) (on file with the North Carolina Law Review). See LITERATURE REPORTS OF INCUBATION PERIOD FOR FOOT AND MOUTH DISEASE, at http://212.187.155.84/pass_06june/List_WPMod_Cont/FMD/Disease_FMDInfection/fmdincub.html (last visited Nov. 29, 2004) (providing more information on the incubation period for FMD) (on file with the North Carolina Law Review).

24. N.C. CHART, *supra* note 18.

FMD must be confirmed through laboratory testing,²⁵ the blisters associated with FMD are the most well-recognized signs of the disease.²⁶ The virus can spread through the exhaled air, milk, semen, and blood of the infected animals, among other means.²⁷ Transmission generally occurs through direct contact.²⁸ FMD “has a remarkable capacity for remaining viable in carcasses, in animal byproducts, in water, in such materials as straw and bedding, and even in pastures.”²⁹ Humans can also transmit the virus between farms and animals.³⁰ Once an outbreak is discovered, eradication normally requires euthanasia.³¹

B. “Mad Cow” Disease

An outbreak of “Mad Cow” Disease is equally threatening to animals and also dangerous to humans. MCD causes a “progressive degeneration of the central nervous system in cattle.”³² The disease is invariably fatal.³³ Originally discovered in 1986, and subsequently documented in at least 180,000 cases³⁴ and nineteen countries, the cause or causes of the disease remain unknown.³⁵ MCD has a lengthy incubation period of two to eight years,³⁶ and its external signs are not as obvious as those associated with FMD.³⁷ Once the clinical signs appear, however, death generally occurs

25. *Id.*

26. WORKING GROUP, *supra* note 18, at 3. The blisters traditionally appear “in the mouth, on the tongue and lips, on the teats, or between the toes” of the infected animals. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. N.C. CHART, *supra* note 18.

31. *Id.*

32. WORKING GROUP, *supra* note 18, at 35. The technical name for Mad Cow is Bovine Spongiform Encephalopathy. *Id.*

33. *Id.*

34. ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP’T OF AGRIC., BOVINE SPONGIFORM ENCEPHALOPATHY (BSE): OVERVIEW (last modified June 30, 2003), at <http://www.aphis.usda.gov/lpa/issues/bse/bse-overview.html> (last visited Nov. 29, 2004) [hereinafter OVERVIEW] (on file with the North Carolina Law Review).

35. WORKING GROUP, *supra* note 18, at 35. The working group paper predates the discovery in America. *Id.* at 1–2. The North Carolina Department of Agriculture notes the existence in at least thirty-one countries. N.C. CHART, *supra* note 18. *But see* Sandra Blakeslee, *Study Lends Support to Mad Cow Theory: Scientists Report Creating a Protein That Spread Disease in Mice*, N.Y. TIMES, July 30, 2004, at A13 (summarizing a recent scientific discovery that may shed light on the cause of MCD).

36. One leading scientist has suggested the incubation period may be longer. *See* Joseph Mercola, *Mad Cow Disease May Have 30 Year Incubation Period* (Mar. 22, 2001), at <http://www.mercola.com/beef/incubation.htm> (last visited Nov. 29, 2004) (on file with the North Carolina Law Review).

37. N.C. CHART, *supra* note 18. The typical external signs associated with MCD are “changes in behavior, incoordination, abnormal posture, falling down, [and] difficulty rising.” *Id.*

within six months.³⁸ The brain tissue of potentially infected cattle must be tested in order to ensure an accurate diagnosis, requiring slaughter of the affected cow.³⁹ Currently, there is no treatment and no vaccine.⁴⁰

MCD spreads through the feeding process. For decades, some cattle feed has contained proteins rendered from the carcasses of other cattle or sheep.⁴¹ When a cow consumes feed containing meat and bone meal from an infected carcass, the consuming cow can contract the disease.⁴² There is no evidence that MCD can be transmitted among live animals.⁴³

Contrary to FMD, MCD threatens human health. Epidemiological and laboratory evidence has demonstrated a link between MCD and a disease in humans called “variant Creutzfeldt-Jakob disease” (“vCJD”).⁴⁴ Like MCD, vCJD is an invariably fatal brain disease and has an incubation period measured in years.⁴⁵ The human version of the disease is acquired by consuming beef from an infected cow.⁴⁶ The precise risk associated with eating beef in countries where MCD has been discovered is difficult to determine because of the long incubation period.⁴⁷ However, the risk of acquiring vCJD is very small—estimated at one case per ten billion servings in the United Kingdom.⁴⁸ Nevertheless, a recent American death shows the continued reality of the threat.⁴⁹

C. *Potential Economic Impact of an FMD or MCD Outbreak in North Carolina*

The potential, however small, of a vCJD outbreak in North Carolina is a serious threat to human health. Yet, the greater threat posed by MCD and FMD is economic. An outbreak of FMD or MCD could potentially devastate the state’s pork or beef industries.⁵⁰ Then-Agriculture

38. OVERVIEW, *supra* note 34.

39. N.C. CHART, *supra* note 18. A test that would not require slaughter is being developed. WORKING GROUP, *supra* note 18, at 35.

40. WORKING GROUP, *supra* note 18, at 35.

41. *Id.*

42. See N.C. CHART, *supra* note 18 (discussing transmission of the disease).

43. *Id.*

44. See CTR. FOR DISEASE CONTROL, BOVINE SPONGIFORM ENCEPHALOPATHY AND VARIANT CREUTZFELDT-JAKOB DISEASE, at <http://www.cdc.gov/travel/diseases/madcow.htm> (last visited Nov. 29, 2004) [hereinafter CDC] (citing “strong evidence” indicating a causal relationship between MCD and vCJD) (on file with the North Carolina Law Review); WORKING GROUP, *supra* note 18, at 36.

45. CDC, *supra* note 44.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Woman Dies*, *supra* note 6.

50. See Williams, *supra* note 5 (noting the potential impact on the pork industry). A simulated FMD outbreak conducted by the N.C. State Emergency Management Office supported

Commissioner Meg Scott Phipps predicted in 2001 that an FMD outbreak could cripple North Carolina's entire economy.⁵¹

North Carolina's legislative response to FMD and MCD is intended to limit the economic impact of an infected animal by preventing the spread of both diseases—in short, to keep one case from sparking an outbreak. In order to assess the value and effectiveness of the response, this Comment will therefore consider the economic consequences of an outbreak rather than a single case.

The last case of FMD in the United States was discovered in 1929.⁵² The first U.S. case of MCD was discovered in December 2003.⁵³ There is no evidence of an outbreak associated with the latter case. Accordingly, any calculation of economic harm from FMD or MCD must rely on theory rather than experience. The economic impact of an FMD outbreak in North Carolina can be estimated and described by considering the FMD outbreak in the United Kingdom in 2001 and the January 2003 federal estimates of the impact of an American FMD outbreak. The federal estimates also demonstrate the potential impact of an MCD epidemic.

D. 2001 FMD Outbreak in the United Kingdom

On February 20, 2001, the first case of FMD was confirmed in the United Kingdom.⁵⁴ Within a month the single case had turned into an epidemic and the government struggled to limit the damage: "Fed by the carcasses of thousands of pigs, sheep and cows, funeral pyres pumped black smoke into the sky as the country battled the latest scourge to its agriculture industry."⁵⁵ The government had slaughtered nearly three million animals by May.⁵⁶ The farming and tourism sectors of the economy bore the brunt of the damage.⁵⁷ Some estimates regarding the long-term damage to the farming sector reached over five billion dollars.⁵⁸

that assessment. The simulation began on a farm in central Duplin County, the heart of North Carolina hog country. *Id.* The six-mile radius would include 440,000 hogs, all of which might have to be slaughtered. *Id.* If the radius was expanded to fifteen miles, the number increases to 1.9 million hogs and at twenty miles, 2.8 million. *Id.*

51. *Id.*

52. See WORKING GROUP, *supra* note 18, at 4.

53. See *Restaurant Shares*, *supra* note 2 (discussing the recovery of share prices in fast food and steakhouse restaurants after the MCD discovery).

54. *The Costs and Cures*, *ECONOMIST*, Mar. 31, 2001, at 63.

55. Stryker McGuire, *Death of the British Farmer*, *NEWSWEEK* (European ed.), Mar. 12, 2001, at 16.

56. *After Foot and Mouth*, *ECONOMIST*, May 5, 2001, at 49.

57. See *id.* (documenting the damage done to the economy by May of 2001 and discussing the expected long-term impact).

58. *Id.*

The tourism industry was also devastated by the FMD outbreak.⁵⁹ One estimate puts the loss for 2001 at between three and four billion dollars.⁶⁰ An official with the British Tourist Authority estimated in May 2001 that it would take three years for the industry to return to full strength.⁶¹ In addition to farming and tourism losses, hunting, fishing, and sporting events were canceled; and parks, forests, and zoos were closed.⁶² The fear of contracting and spreading FMD was so great that the Irish Prime Minister canceled Dublin's St. Patrick's Day parade.⁶³

E. Federal Estimates

The federal government estimates an FMD outbreak would devastate the American economy as it did the United Kingdom's economy.⁶⁴ Unless detected and eradicated immediately, the disease could spread to all sectors of the country simply through routine livestock movement.⁶⁵ Some experts estimate as the worst-case scenario that the disease could affect seventy percent of U.S. livestock.⁶⁶ No matter what size, an outbreak would require the slaughtering of all infected animals and many uninfected animals as a preventive measure. An outbreak could also require that some animals be depopulated to contain the spread and would, at a minimum, require the cleaning, disinfecting, and potential quarantine of affected farms.⁶⁷ Federal estimates place likely productivity losses in the livestock industries at ten to twenty percent.⁶⁸ Given the slim profit margins of the American livestock industry, the losses associated with the slaughters and the income lost over the cleansing period would force some commercial livestock producers to close.⁶⁹

The United States traditionally exports six to ten billion dollars worth of livestock per year, accounting for roughly ten percent of producer income at the farm level.⁷⁰ An FMD outbreak would likely trigger trade restrictions on U.S. beef and pork products, ending exportation in the short-

59. See Alan Cowell, *Foot-and-Mouth Damages English Tourism, Too*, N.Y. TIMES, Mar. 16, 2001, at A4 (discussing the impact on rural tourism and related industries).

60. See *After Foot and Mouth*, *supra* note 56 (estimating the loss at 2.5 million Pounds).

61. *Id.*

62. See Sarah Lyall, *Foot-and-Mouth Disease Intrudes, Putting British Farmers in Dread*, N.Y. TIMES, Mar. 3, 2001, at A1.

63. *Id.*

64. See WORKING GROUP, *supra* note 18, at 9-12.

65. *Id.* at 9.

66. *Id.* at 10-11.

67. *Id.* at 9.

68. *Id.*

69. *Id.*

70. *Id.* at 11.

term.⁷¹ The trade restrictions would lead to an increase in the supply of livestock products on the domestic market, causing those products to decrease in price, and further minimizing the chance small farmers could financially survive an outbreak.⁷²

The federal estimates regarding an MCD outbreak predict similar results. Beef and dairy product sales would likely decline severely.⁷³

Producers forced to destroy their livestock would face additional long-term costs associated with rebuilding. Even though U.S. farmers could be compensated for the market value of animals, . . . producers would lose the time and funds they had spent in building their breeding stock. There would be reduced income while rebuilding the stock. Prices may be higher for purchasing additional stock, while the market price for animal products could decline.⁷⁴

Exportation of cattle and beef products would significantly decrease.⁷⁵ The long incubation period of MCD makes the speed and the direction of the spread difficult to monitor. Consequently, it is expected that trading partners would institute long-term bans on American beef products as opposed to the shorter-term bans caused by an FMD outbreak.⁷⁶

II. THE 2001 RESPONSE AND THE 2003 DECISION TO RENEW

A. *North Carolina's Legislative Response, 2001: Procedure*

Sparked by the threat posed by both FMD and MCD and the discovery of five hogs in Martin and Sampson counties suspected of being infected with FMD,⁷⁷ the North Carolina General Assembly hurriedly responded in April 2001.⁷⁸ In general terms, the legislation increased the quarantine power of the state veterinarian, authorized the veterinarian to conduct warrantless searches and seizures, and authorized the destruction of

71. See *id.* (discussing expected export restrictions); see also Raine, *supra* note 3 (describing the impact on the beef exportation industry).

72. See WORKING GROUP, *supra* note 18, at 11.

73. *Id.* at 39.

74. *Id.* Further exacerbating the decline in beef product prices would be the potential increased availability of safe products on the domestic market due to trade barriers preventing export. *Id.* In addition, as the public preference shifted to other meat products the demand for, and prices of, beef products would likely decline. *Id.*

75. *Id.*

76. *Id.*

77. See Bob Williams, *Hogs Test Negative in State's Second Disease Scare*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 1, 2001, at B1.

78. See Kerra Bolton Fisher, *State Moves On Foot-and-Mouth Bill; Legislators Hope Law Would Prevent Spread of Disease*, ASHEVILLE CITIZEN-TIMES, Apr. 4, 2001, at B1.

potentially infected animals without notice.⁷⁹

Media reports noted the speed with which the General Assembly acted.⁸⁰ The bill, S.B. 779, was introduced in the Senate on April 2, 2001 with the short title: "Control Foot & Mouth/Animal Disease Outbreak."⁸¹ After referral to the Agriculture Committee on April 2,⁸² the Committee considered the bill, amended it twice, and gave it a favorable report—all on the following day, April 3.⁸³ Senator Charles Albertson (D-Duplin, Harnett, Sampson) offered the first amendment, which would authorize the state veterinarian to destroy as well as seize potentially infected animals without notifying the owner.⁸⁴ Senator Hamilton Horton (R-Forsyth) offered the second amendment, which added a two-year sunset provision to the legislation.⁸⁵ Later that day the Senate received the substitute version from the committee, placed the new version on that day's calendar,⁸⁶ and passed the bill.⁸⁷ S.B. 779 was then sent to the House for consideration.⁸⁸

The House, meanwhile, was considering a companion bill, H.B. 965.⁸⁹ Working somewhat out of order,⁹⁰ a draft version of the House bill was considered on April 3 at 10:05 a.m. in the House Agriculture Committee.⁹¹

79. See Act of Apr. 4, 2001, ch. 12, 2001 N.C. Sess. Laws 14 (codified as amended in scattered sections of N.C. GEN. STAT. § 106); see also Fisher, *supra* note 78 (describing the legislation); Bob Williams, *All Eyes on Most Powerful Vet in State History*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 22, 2001, at B1 (describing the legislation).

80. Lynn Bonner, *Legislature Still Faces Toughest Issues of All*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 30, 2001, at A1 ("[L]egislators quickly approved sweeping new powers for the state veterinarian."); Fisher, *supra* note 78 (describing the General Assembly as moving like "greased lightning"); Williams, *supra* note 77 (noting the brief debate before passage).

81. S. 779, 2001 Gen. Assem., Reg. Sess. (N.C. 2001) (edition 1), at <http://www.ncleg.net/html2001/bills/AllVersions/Senate/S779v1.html> (last visited Nov. 29, 2004) (on file with the North Carolina Law Review).

82. 2001 N.C. Senate Journal 255. The committee held an earlier hearing on FMD on March 20. *Control Foot & Mouth/Animal Disease Outbreaks: Hearing on Foot and Mouth Disease Before the Senate Agriculture/Environment/Natural Resources Committee*, 2001 Gen. Assem., Reg. Sess. (N.C. 2001) (Mar. 20, 2001 minutes). At that hearing, then-Agriculture Commissioner Meg Scott Phipps and State Veterinarian Dr. David Marshall testified regarding the disease and its spread. *Id.* Dr. Marshall explained the necessity of slaughtering animals to prevent an outbreak. *Id.*

83. *Control Foot & Mouth/Animal Disease Outbreaks: Hearing on S.B. 779 Before the Senate Agriculture/Environment/Natural Resources Committee*, 2001 Gen. Assem., Reg. Sess. (N.C. 2001) (Apr. 3, 2001 minutes).

84. *Id.* (amendment proposed by Sen. Albertson).

85. *Id.* (amendment proposed by Sen. Horton). See *infra* note 153 and accompanying text (defining "sunset provision").

86. 2001 N.C. Senate Journal 265.

87. *Id.* at 266.

88. *Id.*

89. See 2001 N.C. House Journal 425. A "companion bill" is a second version of a bill introduced in the opposite house. The bills are substantially, but not always absolutely, similar.

90. The Committee considered the draft version of the legislation before S.B. 779 was officially introduced in the House.

91. *Control Foot & Mouth/Animal Disease Outbreaks: Hearing on Draft H.B. 965 Before*

At that time, the state veterinarian testified before the committee.⁹² He discussed the power to destroy potentially infected animals and the need for greater quarantine power.⁹³ Some members raised the possibility that the Governor should be included in the emergency decisionmaking process and discussed who might be allowed to speak for the Governor if he were unavailable during an outbreak.⁹⁴ The committee chairman adjourned the meeting and announced that the committee would meet again during the House session that afternoon.⁹⁵ The House bill was officially introduced at 3:00 p.m.⁹⁶ and referred to the Agriculture Committee.⁹⁷ At 3:30 p.m., the House recessed⁹⁸ and the Agriculture Committee met to officially consider H.B. 965.⁹⁹ At 3:35 p.m., the Committee meeting was called to order.¹⁰⁰ A Proposed Committee Substitute version of the bill was introduced and passed unanimously.¹⁰¹ The new version added a sunset provision identical to the one added to S.B. 779 in the Senate Agriculture Committee.¹⁰² Committee members raised concerns regarding the warrantless search and seizure power, but, in the interest of speedy passage, the committee decided that no amendments would be accepted.¹⁰³ The House reconvened at 4:10 p.m.¹⁰⁴ and adopted the committee substitute version, amended it, and passed H.B. 965.¹⁰⁵ The amendment adopted on the House floor required the state veterinarian to receive "approval from the Governor" before he exercised the powers authorized in the bill.¹⁰⁶ H.B. 965 was then sent to the Senate.¹⁰⁷ The House had introduced, sent to committee, considered, amended, and passed its version of the bill in one day. The next day, April

the House Agriculture Committee, 2001 Gen. Assem., Reg. Sess. (N.C. 2001) (Apr. 3, 2001 minutes).

92. *Id.*

93. *Id.* See *infra* notes 132–38 and accompanying text (describing the increase in quarantine power).

94. *Id.*

95. *Id.*

96. See 2001 N.C. House Journal 416 (documenting 3:00 p.m. as the beginning of the session).

97. See *id.* at 425.

98. *Id.* at 426.

99. *Control Foot & Mouth/Animal Disease Outbreaks: Hearing on S.B. 779 Before the Senate Agriculture/Environment/Natural Resources Committee*, 2001 Gen. Assem., Reg. Sess. (N.C. 2001) (Apr. 3, 2001 minutes).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. See *id.* (noting that the bill was to return to the floor at 4:10).

105. 2001 N.C. House Journal 427.

106. H.R. 965, 2001 Gen. Assem., Reg. Sess. (N.C. 2001) (version 3), at <http://www.ncleg.net/html2001/bills/AllVersions/House/H965v3.html> (last visited Nov. 29, 2004) (on file with the North Carolina Law Review).

107. 2001 N.C. House Journal 427.

4, the Senate received H.B. 965.¹⁰⁸ The Senate referred the House version to the Agriculture Committee where H.B. 965 died in favor of the Senate version.¹⁰⁹

Also on April 3, one day after S.B. 779 had been introduced in, and the same day it had been passed by, the Senate, the House received the Senate version of the bill and referred S.B. 779 to its Agriculture Committee.¹¹⁰ At noon on April 4, the House Agriculture Committee met to “hear and expedite passage” of a House committee substitute version of S.B. 779.¹¹¹ The substitute version included two key differences from H.B. 965 and the original version of S.B. 779: it removed the sunset provision that had been added to both the original House and Senate versions and changed the authorizing language from “with the approval of” the Governor to “in consultation with” the Governor or the Governor’s designee.¹¹² Both changes were discussed in the committee, and the change to the authorizing language was adopted.¹¹³ After House committee members expressed concerns over the inability to pass the legislation without a sunset provision, the committee substitute version was amended to include a four-year sunset provision.¹¹⁴ The House convened later that day and adopted the substitute version offered by the House Agriculture Committee.¹¹⁵ S.B. 779 was amended twice on the House floor.¹¹⁶ The first amendment changed the authorizing language back to “with the approval of the Governor” rather than “in consultation with the Governor or the Governor’s designee.”¹¹⁷ The second amendment changed the sunset provision back to a two-year sunset.¹¹⁸ The House then sent S.B. 779 back to the Senate.¹¹⁹ The Senate immediately considered and approved both the House committee substitute version and the two amendments and sent the

108. 2001 N.C. Senate Journal 278.

109. House Bill 965 (=S779), at <http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2001&BillID=h+965> (last visited Nov. 29, 2004) (detailing the legislative history of H.B. 965) (on file with the North Carolina Law Review).

110. 2001 N.C. House Journal 428.

111. *Control Foot & Mouth/Animal Disease Outbreaks: Hearing on Proposed House Committee Substitute to S.B. 779 Before the House Agriculture Committee*, 2001 Gen. Assem., Reg. Sess. (N.C. 2001) (Apr. 4, 2001 minutes).

112. *Id.*

113. *Id.*

114. *Id.*

115. 2001 N.C. House Journal 431 (indicating the House Agriculture Committee favorably reported and calendared the House committee substitute version).

116. *Id.* at 438.

117. North Carolina General Assembly Amendment, S. 779, Apr. 4, 2001 (amendment proposed by Rep. Allred) (on file with the North Carolina Law Review).

118. North Carolina General Assembly Amendment, S. 779, Apr. 4, 2001 (amendment proposed by Rep. Blust) (on file with the North Carolina Law Review).

119. 2001 N.C. House Journal 438.

bill to the Governor.¹²⁰ The Governor signed the bill at 6:44 p.m. that same day, April 4—only two days after its original introduction in the Senate.¹²¹ Given the rate at which legislation is normally considered by the North Carolina General Assembly, S.B. 779's forty-eight-hour sprint from introduction on the Senate floor to signature by the Governor is nothing short of remarkable.¹²²

B. *North Carolina's Legislative Response, 2001: Substance*

The rapid passage and near-unanimous vote counts mask important and controversial elements of S.B. 779. Five notable aspects of the legislation were highlighted by public disagreement, committee debate, amendments, and discrepancies between the House and Senate versions. S.B. 779 dramatically increased the quarantine power of the state veterinarian, authorized the state veterinarian to conduct warrantless searches and seizures of vehicles and individuals, and allowed for the slaughter of potentially infected animals without notifying the owner.¹²³ However, certain conditions must be met before the state veterinarian is allowed to exercise any of the newly granted authority. The powers are triggered only by an "imminent threat" of "serious" economic consequence, and the veterinarian must consult with the Agriculture Commissioner and receive approval from the Governor before acting.¹²⁴ The legislation also included a two-year "sunset provision."¹²⁵

The five important aspects of S.B. 779 break down into three new powers for the state veterinarian, the triggering provision, and the sunset provision. The first of the controversial new powers granted to the veterinarian is the warrantless search and seizure power.¹²⁶ She is authorized to conduct warrantless searches of any person or car suspected of carrying a contagious animal disease.¹²⁷ This new power was not universally endorsed in 2001. Senator Hamilton Horton (R-Forsyth) described the warrantless search and seizure power as equivalent to "war

120. 2001 N.C. Senate Journal 283.

121. Senate Bill 779 (=H965), at <http://www.ncleg.net/gascritps/BillLookUp/BillLookUp.pl?Session=2001&BillID=s779> (last visited Nov. 29, 2004) (on file with the North Carolina Law Review). See Act of Apr. 4, 2001, ch. 12, § 11, 2001 N.C. Sess. Laws 14, 21 (showing the time of the Governor's signature).

122. See Fisher, *supra* note 78 and accompanying text.

123. See Act of Apr. 4, 2001, ch. 12, 2001 N.C. Sess. Laws 14 (codified in scattered sections of N.C. GEN. STAT. § 106).

124. *Id.*

125. *Id.* See *infra* note 153 and accompanying text (defining "sunset provision").

126. See Act of Apr. 4, 2001, ch. 12, § 1, 2001 N.C. Sess. Laws 14, 14–15 (codified as amended at N.C. GEN. STAT. §§ 106-399.4–399.5).

127. Act of Apr. 4, 2001, ch. 12, sec. 1, § 106-399.5, 2001 N.C. Sess. Laws 14, 15 (codified as amended at N.C. GEN. STAT. § 106.399.5).

powers”: “We’re authorizing, through this bill, the state veterinarian to take on powers we would never give to a police officer—a warrantless search and destroying valuable process at the owner’s expense. Due process is out of the window.”¹²⁸ A Greensboro *News & Record* editorial, arguing the General Assembly “[went] off half-cocked” and calling the legislation “melodramatic” and “unnecessary,” claimed: “[I]n a minor fit of hysteria this week, both houses of the General Assembly rushed through ill-conceived and dangerous bills authorizing warrantless seizures.”¹²⁹ In contrast, supporters referred to the power as part of a “necessary preemptive strike” against the spread of contagious animal diseases.¹³⁰ This Comment will defend the authorization of the warrantless search and seizure power as being within constitutional limits and consistent with other North Carolina statutes.¹³¹

Second, S.B. 779 expanded the state veterinarian’s quarantine power. The state veterinarian’s quarantine power was previously limited to the ability to quarantine an animal or a farm.¹³² The 2001 legislation empowered the state veterinarian to quarantine “areas within the State”¹³³—a much larger geographic area. Animal movement within the quarantine zone is prohibited unless the state veterinarian grants authorization.¹³⁴ The notice provisions demonstrate the difference, as contemplated by the General Assembly, between the pre-2001 power¹³⁵ and the power authorized by S.B. 779. Under the old provision, the only public notice required was the “posting or placarding with a suitable quarantine sign the entrance to any part of the premises on which the animal is held.”¹³⁶ Under S.B. 779, when exercising the new quarantine power, the state veterinarian must notify through writing the “news media, farm organizations, agriculture agencies, and other entities reasonably calculated to give notice of the quarantine to affected animal owners, to the owners or operators of affected premises, and to the public.”¹³⁷ The different notice requirements

128. Fisher, *supra* note 78.

129. *No Warrantless Seizures*, NEWS & RECORD (Greensboro, N.C.), Apr. 6, 2001, at A10.

130. *General Assembly Goes to War Against Disease*, ASHEVILLE CITIZEN-TIMES, Apr. 9, 2001, at A6.

131. *See infra* Part III.

132. *See* N.C. GEN. STAT. 106-401* (2003) (authorizing the quarantine of animals infected with or exposed to a contagious disease and establishing a notice method based on the premises on which those animals are located). This Comment uses “*” to designate the pre-2001 version of the legislation, which is still valid although not in effect until S.B. 779’s provisions sunset. *See infra* note 231 (explaining the use of N.C. GEN. STAT. § 106-401*).

133. Act of Apr. 4, 2001, ch. 12, sec. 2, § 106-401(b), 2001 N.C. Sess. Laws 14, 16 (codified as amended at N.C. GEN. STAT. § 106-401(b)).

134. *Id.*

135. N.C. GEN. STAT. § 106-401* (2003).

136. *Id.*

137. Act of Apr. 4, 2001, ch. 12, sec. 2, § 106-401(b), 2001 N.C. Sess. Laws 14, 17 (codified

signal the broad quarantine power contemplated by the phrase “areas within the State” by emphasizing the need to notify a greater number of interested parties and the public in general. The nature of the language chosen—“areas within the State”—and the derivative ability to quarantine large sections of the state are the roots of the controversy. This Comment will demonstrate the constitutionality of the expanded quarantine power.¹³⁸

The third important power was the authority to slaughter potentially infected animals without giving notice to the owner. The veterinarian was only authorized to seize the animal without notice in the original version of the bill.¹³⁹ The power to destroy the animal was added as an amendment.¹⁴⁰ This Comment will show that the Constitution does not require notice prior to slaughter.¹⁴¹ Moreover, this Comment will illustrate that, although controversial, the authority to destroy is not unique, as other North Carolina statutes include similar provisions.¹⁴²

The “triggering” provision of the legislation has three elements. The first element concerns the situation in the state.¹⁴³ To satisfy the first element, the state veterinarian must determine that the animal disease poses “an imminent threat.”¹⁴⁴ This condition is easily met by one case of FMD or MCD given the nature of the contagious diseases and the projected economic impact in North Carolina.¹⁴⁵ The state veterinarian is also required to consult the Agriculture Commissioner.¹⁴⁶ Consultation is left undefined by the statute,¹⁴⁷ and the satisfaction of this condition is entirely in the state veterinarian’s control;¹⁴⁸ hence, as with the first element, this

as amended at N.C. GEN. STAT. § 106-401(b)).

138. See *infra* Part IV.

139. S. 779, 2001 Gen. Assem., Reg. Sess. (N.C. 2001) (edition 1), at <http://www.ncleg.net/html2001/bills/AllVersions/Senate/S779v1.html> (last visited Nov. 29, 2004) (“In the event the owner . . . cannot be notified, the State Veterinarian . . . may seize the animal”) (on file with the North Carolina Law Review).

140. *Control Foot & Mouth/Animal Disease Outbreaks: Hearing on S.B. 779 Before the Senate Agriculture/Environment/Natural Resources Committee*, 2001 Gen. Assem., Reg. Sess. (N.C. 2001) (amendment proposed by Sen. Albertson).

141. See *infra* Part V.

142. See *infra* Part V.B.

143. Act of Apr. 4, 2001, ch. 12, sec. 1, § 106-399.4(a), N.C. Sess. Laws 14, 14 (codified as amended at N.C. GEN. STAT. § 106-399.4).

144. *Id.* The statute defines the condition as “an imminent threat within the State of a contagious animal disease that has the potential for very serious and rapid spread, is of serious socioeconomic and public health consequence, or is of major importance in the international trade of animals and animal products . . .” *Id.*

145. See *supra* Part I.C. (discussing the impact of an outbreak of FMD or MCD on North Carolina).

146. Act of Apr. 4, 2001, ch. 12, sec. 3, § 106-402.1, 2001 N.C. Sess. Laws 14, 17–18 (codified as amended at N.C. Gen. Stat. § 106-402.1).

147. See *id.* (failing to note a specific definition of “consultation”).

148. This Comment presumes that the Commissioner will be available during the crisis or will leave clear directions regarding how to contact her. Furthermore, this Comment draws a

condition is easily met. The third element is more controversial.¹⁴⁹ The bill was amended on the House floor to require the approval of the Governor as opposed to requiring only consultation with the Governor.¹⁵⁰ The vote was closer on the amendment than on the bill as a whole.¹⁵¹ This Comment will defend the decision to require approval rather than consultation by exploring statutes that require the Governor's approval and assessing the policy implications of the choice.¹⁵²

The final controversial aspect of the legislation was the sunset provision. A sunset provision sets a date after which the laws or powers that are the subject of the legislation are no longer in force.¹⁵³ As noted above, the sunset provision was added in and taken out of the legislation numerous times.¹⁵⁴ In its final form, S.B. 779 expired by its own terms on April 1, 2003, roughly two years after it was signed.¹⁵⁵ This Comment assesses the benefits and costs of the two-year expiration date and concludes that the sunset provision, at the least, was an unnecessary addition to the legislation, and at worst, weakens the protection offered by S.B. 779.¹⁵⁶

distinction between "consultation," which by its vague nature is virtually no limit on the decisionmaking process and "approval," which requires the state veterinarian to wait on the independent action of the Governor prior to implementation.

149. The first time the amendment was offered on H.B. 965, the House voted 110-2 to add the "approval" language. North Carolina General Assembly Amendment, H.R. 965, Apr. 3, 2001 (amendment proposed by Rep. Allred) (on file with the North Carolina Law Review); North Carolina House of Representatives Roll Call, H.R. 965, Seq. no. 131, Apr. 3, 2001 (on file with the North Carolina Law Review). However, the second time the amendment was offered on S.B. 779, the House voted 85-29 to substitute "approval" for "consultation." North Carolina General Assembly Amendment, S. 779, Committee Substitute, Apr. 4, 2001 (amendment proposed by Rep. Allred) (on file with the North Carolina Law Review); North Carolina House of Representatives Roll Call, S. 779, Seq. no. 134, Apr. 4, 2001 (on file with the North Carolina Law Review). Twenty-seven representatives would rather require consultation than approval but find approval better than no requirement.

150. North Carolina General Assembly Amendment, S. 779, Committee Substitute, Apr. 4, 2001 (amendment proposed by Rep. Allred) (on file with the North Carolina Law Review); North Carolina House of Representatives Roll Call, S. 779, Seq. no. 134, Apr. 4, 2001 (approving the amendment proposed by Rep. Allred) (on file with the North Carolina Law Review).

151. Compare North Carolina House of Representatives Roll Call, S. 779, Seq. no. 134, Apr. 4, 2001 (approving the amendment proposed by Rep. Allred by a vote of eighty-five to twenty-nine) (on file with the North Carolina Law Review), with North Carolina House of Representatives Roll Call, S. 779, Seq. no. 136, Apr. 4, 2001 (passing S. 779 by a vote of 110 to four) (on file with the North Carolina Law Review).

152. See *infra* Part VI.

153. See *Poland v. Educ. Credit Mgmt. Corp.*, 276 B.R. 660, 666 n.3. (D. Kan. 2001) (memorandum decision) ("That law contained a 'sunset provision' under which the amendment was slated to expire on Oct. 1, 1996."); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 50 F. Supp. 2d 741, 767 (S.D. Ohio 1999).

154. See *supra* Part II.A (discussing legislative history).

155. Act of Apr. 4, 2001, ch. 12, § 11, 2001 N.C. Sess. Laws, 14, 21.

156. See *infra* Part VII.

C. *North Carolina's Executive Response, 2001*

The state's reaction to the five hogs suspected of infection in 2001¹⁵⁷ and the state emergency management plan demonstrate how the police powers authorized in S.B. 779 might look when implemented. In response to the five suspected cases of FMD in North Carolina, both of which occurred before S.B. 779 was introduced, the state veterinarian quickly applied the limited quarantine power authorized in the pre-2001 statute.¹⁵⁸ The packing plant and the buying station at which the potentially infected hogs were discovered were both immediately quarantined.¹⁵⁹ The hogs were sent for testing and shipping records were used to determine other potentially infected hogs.¹⁶⁰ In both cases, the test for FMD did not show the presence of the disease.¹⁶¹

The state emergency operation manual describes the procedure for handling a positive test result under the newly granted powers. A 2001 *News & Observer* article summarized the planned response:

Were there a confirmed case of foot-and-mouth disease in Eastern North Carolina, the state would immediately seal off a perimeter, quarantining the area for six miles in all directions. Roads leading into the area would be blocked by the National Guard, state troopers or other law enforcement personnel. If the area were near an interstate highway, traffic would be detoured around the quarantine zone.

Anyone allowed into the quarantined area would have to first pass through a decontamination checkpoint. Vehicles would have to drive through a decontamination unit that would blast all surfaces with a mix of water and disinfectant, anything from household bleach to citric acid. People would have to change their clothes or don protective decontamination suits.

Teams of veterinarians in special suits and gas masks would rush to the infected farm to kill all the animals. Each would use a captive-bolt gun, a device specially designed to humanely kill large numbers of livestock, especially pigs. Disposal teams would move in after that, covering dead animals with plastic until they could be buried.

The teams would then move on to surrounding farms. Animals found to be infected or suspected of having the disease would also be

157. See Williams, *supra* note 77.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

killed and their carcasses buried.

At the same time, agricultural officials would be trying to track down any animals that might have come in contact with the infected livestock, poring through shipping and sales records. Those animals would also have to be tracked down, tested, and killed if necessary.

Command posts would be set up, along with mobile kitchens and barracks within the quarantined zone for workers. Anyone exiting the zone would have to be decontaminated.

Additional personnel from USDA and other federal agencies would arrive fairly quickly. Military personnel might be called in, as they were during Hurricane Floyd.

And all that assumes the disease could be detected quickly and confined to a single site—an assumption most experts believe is unlikely.¹⁶²

Given that the statutory provisions have remained unchanged, the current response plan is likely similar.

D. North Carolina's Decision to Renew, 2003

On March 31, 2003, the day before the 2001 legislation expired, Governor Easley signed S.B. 307, extending the 2001 authorization until October 2005.¹⁶³ The original version of S.B. 307 removed the sunset provision.¹⁶⁴ However, the Senate Agriculture Committee's substitute version, instead of removing the sunset date, extended it to October 1, 2005;¹⁶⁵ the full Senate accepted the committee's substitute.¹⁶⁶ The 2003 renewal leaves the state veterinarian's substantive powers as passed in 2001 currently in force.

III. THE WARRANTLESS SEARCH AND SEIZURE POWER

As proposed and enacted in S.B. 779 and extended in S.B. 307, North

162. Williams, *supra* note 5.

163. Act of Mar. 24, 2003, ch. 6, §§ 1–2, 2003 N.C. Sess. Laws 3, 3–4 (ratifying S.B. 307 to extend the sunset date included in the enacted version of S.B. 779).

164. S. 307, 2003 Gen. Assem., Reg. Sess. (N.C. 2003) (edition 1), at <http://www.ncleg.net/html2003/bills/AllVersions/Senate/S307v1.html> (last visited Nov. 29, 2004) (on file with the North Carolina Law Review).

165. S. 307, 2003 Gen. Assem., Reg. Sess. (N.C. 2003) (edition 2), at <http://www.ncleg.net/html2003/bills/AllVersions/Senate/S307v2.html> (last visited Nov. 29, 2004) (on file with the North Carolina Law Review); see also Act of Apr. 4, 2001, ch. 12, § 11, 2001 N.C. Sess. Laws 14, 21 (ratifying S.B. 779, including the original Apr. 1, 2003 sunset date).

166. Act of Mar. 24, 2003, ch. 6, 2003 N.C. Sess. Laws 3, 3–4.

Carolina General Statute section 106-399.5¹⁶⁷ authorizes the state veterinarian or his representative to stop and inspect any individual or vehicle if there is probable cause to believe the person or moving vehicle traveling into or within the state is carrying any animal or item capable of transmitting a contagious animal disease.¹⁶⁸ FMD can be transferred on the clothes of a person.¹⁶⁹ Consequently, the maximum power envisioned by the General Assembly—warrantless search and seizure of any individual—could be exercised to contain a case of FMD. Granting such power is within the bounds of the Fourth and Fourteenth Amendments to the U.S. Constitution¹⁷⁰ and is consistent with other North Carolina statutes.¹⁷¹

A. “Administrative” or “Emergency” Search?

It is important to note initially the potential to assess the warrantless search¹⁷² power authorized by section 106-399.5 under two separate theories. Under the first option, the warrantless search power is authorized under a statutory regulatory scheme designed to maintain livestock health and economic safety.¹⁷³ The fact that the power is granted to an

167. N.C. GEN. STAT. § 106-399.5 (2003). The powers and provisions included in S.B. 779 will be addressed in their statutory form.

168. *Id.*

169. N.C. CHART, *supra* note 18.

170. U.S. CONST. amends. IV, XIV.

171. This Comment addresses the warrantless search and seizure power authorized under section 106-399.5. Section 106-399.4 authorizes the veterinarian to “enter any property in the State to examine any animal that the State Veterinarian has reasonable grounds to believe is infected with or exposed to a contagious animal disease.” N.C. GEN. STAT. § 106-399.4(d) (2003). A warrantless section 399.4(d) entry is subject to the same constitutional analysis as a search under section 399.5.

172. When this Comment refers to “searches,” the assessment applies to searches and seizures.

173. This Comment does not consider in depth the justification for the warrantless search power as a component of a regulatory scheme. However, it is important to note that this justification may be required to defend the power in full. While this Comment focuses on containment of an individual case and prevention of an outbreak, the veterinarian’s powers can also be used to implement and conduct a post-containment eradication program. *See* N.C. GEN. STAT. § 106-399.4(a) (2003) (establishing the veterinarian’s ability to “develop and implement any emergency measures and procedures . . . necessary to prevent and control the animal disease.”). This distinction presents line-drawing problems. It is unclear exactly when an emergency quarantine transitions into a presumably longer-lasting eradication program. Warrantless searches used within an eradication program would need to meet the three-element test articulated in *New York v. Burger*, 482 U.S. 691 (1987) and endorsed by the Court of Appeals of North Carolina in *State v. Sapatch*, 108 N.C. App. 321, 423 S.E.2d 510 (1992): one, the government must have a substantial interest in the regulatory scheme pursuant to which the inspection is being made; two, the warrantless inspections must be necessary to further the scheme; and three, the regulatory scheme must be able to serve as a constitutionally adequate substitute for a warrant. *See id.* at 324, 423 S.E.2d at 512 (1992) (quoting *New York v. Burger*, 482 U.S. 691, 702–03 (1987)). Administrative searches are also considered in *State v. Nobles*, 107 N.C. App. 627, 422 S.E.2d 78, 80 (1992) and *Durham Video and News, Inc. v. Durham*

administrative agent, the state veterinarian,¹⁷⁴ supports this approach. The second option addresses the warrantless search power as an exception to the traditional search and seizure power: the ability to conduct a warrantless search in exigent circumstances.¹⁷⁵ The “exigent circumstances” approach does not consider the power as a component of a larger regulatory scheme; instead, it justifies the absence of a warrant based on the surrounding circumstances.¹⁷⁶

The warrantless search authority of section 106-399.5 should be examined under the second approach. The warrantless search power can only be “triggered” by emergency conditions.¹⁷⁷ The “triggering” provision indicates the General Assembly envisioned the exercise of this power only under a precise condition—an emergency scenario—rather than as part of a continuous regulatory scheme. Accordingly, warrantless searches should be assessed under the exigent circumstances exception.

B. Exigent Circumstances Exception

In constitutional language, an emergency scenario is considered an exigent circumstance. *State v. Nance*,¹⁷⁸ decided in 2002 by the Court of Appeals of North Carolina, supports the validity of warrantless searches in exigent situations.¹⁷⁹ The defendant in *Nance* was convicted of misdemeanor animal cruelty.¹⁸⁰ Starving horses were seized from her farm without a warrant.¹⁸¹ The court held that the situation did not amount to the sort of exigent circumstances necessary to justify a warrantless search;¹⁸² however, the court generally defined the circumstances required to meet the exigent circumstances exception.¹⁸³ The court noted that warrantless

Board of Adjustment, 144 N.C. App. 236, 240, 550 S.E.2d 212, 214 (2001). In addition, it is particularly important to note a non-North Carolina case, *Gleaves v. Waters*, 220 Cal. Rptr. 621, 624–25 (Cal. Ct. App. 1985) (finding a warrantless inspection of plaintiffs’ yard, pursuant to a state program attempting to eradicate Japanese Beetles, to be unconstitutional).

174. N.C. GEN. STAT. § 106-399.5 (2003).

175. See *State v. Nance*, 149 N.C. App. 734, 743–44, 562 S.E.2d 557, 564 (2002) (balancing the need for action and the individual’s rights in determining the existence of exigent circumstances for warrantless searches) (citing *State v. Santana*, 427 U.S. 38, 42–43 (1976)); see also *Camara v. Mun. Court*, 387 U.S. 523, 539 (1967) (enumerating types of circumstances that qualify as “exigent”).

176. *Id.*

177. See N.C. GEN. STAT. § 106-399.5 (2003) (mandating identification of imminent threat and requiring consultation with the Agriculture Commissioner and approval of the Governor before initiating warrantless searches); see also *infra* Part VI (discussing the “trigger” elements further).

178. 149 N.C. App. 734, 562 S.E.2d 557 (2002).

179. *Id.* at 743, 562 S.E.2d at 563–64.

180. *Id.* at 735, 562 S.E.2d at 559.

181. *Id.* at 737, 562 S.E.2d at 560.

182. *Id.* at 744, 562 S.E.2d at 564.

183. *Id.* at 743, 562 S.E.2d at 563–64.

searches are allowed if the situation demands immediate or unusual action.¹⁸⁴ “[E]xigent circumstances exist where the need for immediate action is so great as to outweigh the potential infringement of a defendant’s rights under the Fourth Amendment”¹⁸⁵

The animal cruelty statute in *Nance* did not expressly authorize warrantless searches, so the court considered the state’s action under the traditional Fourth Amendment criminal investigation rubric rather than addressing the constitutionality of a statutory provision authorizing a warrantless search.¹⁸⁶ Nevertheless, the *Nance* analysis is applicable to section 106-399.5, which expressly authorizes warrantless searches. The North Carolina General Assembly cannot authorize inspection power in conflict with the U.S. Constitution.¹⁸⁷ Therefore, any warrantless power granted by statute for use in emergency situations must at least be able to pass the exigent circumstances test noted in *Nance* to be justified as an emergency exception to the general constitutional rule.

The warrantless search power of section 106-399.5 meets the *Nance* standard. The threat posed by a potentially unchecked FMD or MCD outbreak creates a substantial need for immediate action.¹⁸⁸ The economic effect of an FMD or MCD outbreak would be catastrophic.¹⁸⁹ Therefore, the potential damage to the state outweighs the individual privacy interests protected by the Fourth Amendment.

While North Carolina courts have not extensively addressed the constitutionality of a warrantless search in the context of a threat to agriculture, federal courts have examined the issue. Federal case law also supports the warrantless search power granted to the state veterinarian. The United States Supreme Court noted that the “exigent circumstances” exception allowed for warrantless destruction of tubercular cattle.¹⁹⁰ In *Camara v. Municipal Court*¹⁹¹ a California resident challenged the state’s power to conduct warrantless inspections as part of a home inspection program.¹⁹² After finding the California law in conflict with the Fourth Amendment, the Court noted that nothing in *Camara* invalidated the power to conduct warrantless searches and seizures in emergency situations.¹⁹³ It

184. *Id.*

185. *Id.* at 743–44, 562 S.E.2d at 564.

186. *Id.* at 741–42, 562 S.E.2d at 562–63.

187. U.S. CONST. art. VI (establishing the U.S. Constitution as the supreme law of the land).

188. *See supra* Part I.A–B.

189. *See supra* Part I.C–E.

190. *Camara v. Mun. Court*, 387 U.S. 523, 539 (1967) (citing *Kroplin v. Truax*, 165 N.E. 498 (Ohio 1929)).

191. 387 U.S. 523 (1967).

192. *Id.* at 525.

193. *Id.* at 539.

specifically endorsed warrantless searches used in response to emergency health situations, such as an outbreak of tuberculosis in cattle.¹⁹⁴

The Ninth Circuit applied the emergency exception rationale to a warrantless quarantine inspection in 1972.¹⁹⁵ *United States v. Schafer*¹⁹⁶ held that warrantless searches of passenger luggage for agriculture products that could transmit potentially devastating plant diseases were constitutional.¹⁹⁷ The passenger was leaving Hawaii during a time that Hawaii was under federal quarantine, and the warrantless inspections were authorized by statute.¹⁹⁸ The court noted a rationale for the federal quarantine similar to the reasoning underlying an FMD or MCD response:

The objects of the search (quarantined fruits, vegetables, and plants) can easily be transported out of Hawaii to the continental United States by departing tourists. The effect of such movement on agricultural crops in the mainland states could be serious, as each of the quarantined items may carry some form of plant disease or insect which could destroy crops in the other areas. The purpose of the quarantine is to avoid these effects by preventing the movement of the potentially dangerous plant substances.¹⁹⁹

The court found that searches were justified based on the “likelihood that persons departing the quarantine area at that point will be carrying one or more of the plant substances” as opposed to being based on a reason to suspect the *particular person* searched.²⁰⁰ Individualized probable cause, in this context, need not be demonstrated to justify a warrantless search.

In 1996, the exigent circumstances exception was again examined in *United States v. Rohrig*.²⁰¹ In *Rohrig*, the Sixth Circuit upheld a warrantless search of a home after officers responded to complaints about loud music being played from the house in the early hours of the morning.²⁰² The court detailed the specific sorts of exigent circumstances that have been recognized as exceptions.²⁰³ The *Rohrig* court highlighted the “risk of danger” version of the “exigent circumstances” exception—

194. See *id.* (referring to seizure of unwholesome food, compulsory smallpox vaccination, health quarantines, and the destruction of diseased cattle as examples).

195. *United States v. Schafer*, 461 F.2d 856 (9th Cir. 1972).

196. *Id.*

197. *Id.* at 858.

198. *Id.* at 857–58.

199. *Id.* at 858.

200. *Id.* at 859.

201. 1996 FED App. 0346P, 98 F.3d 1506 (6th Cir. 1996).

202. *Id.* at 2, 98 F.3d at 1509.

203. *Id.* at 15, 98 F.3d at 1515 (discussing four general categories of exigent circumstances: (1) hot pursuit of a fleeing felon; (2) imminent destruction of evidence; (3) prevention of a suspect's escape; and (4) risk of danger to police or others).

where the potential danger posed by a certain set of circumstances justifies the warrantless search—and found this rationale to be the most frequently cited by the Supreme Court to justify “cases where the Government is acting in something other than a traditional law enforcement capacity.”²⁰⁴ Although *Rohrig* was addressing a warrantless search of a home, the court cited the slaughter of diseased cattle as an example of this sort of situation.²⁰⁵

Federal case law, therefore, supports the constitutionality of the warrantless search power. The federal courts that have addressed the issue note both the continued existence of the “exigent circumstances” exception—in particular, the “risk of danger” version—and the applicability of that exception in the context of diseased cattle.

Authorizing the state veterinarian to conduct warrantless searches and seizures is also consistent with case law from other states. In the 1980 case *People v. Dickinson*,²⁰⁶ the California Court of Appeal upheld the constitutionality of a quarantine statute targeting pests that posed a threat to agriculture.²⁰⁷ The statute authorized the agriculture director to establish “quarantine inspection stations for the purpose of inspecting all conveyances which might carry plants or other things which are, or are liable to be infested or infected with any pest.”²⁰⁸ The court noted the critical role the inspection stations played in the quarantine regulation.²⁰⁹ The court limited its holding to the facts of the case: it upheld the power to request permission to search, and if permission was granted, to search the trunks of vehicles passing through the inspection stations.²¹⁰ It did not address the constitutionality of the broader search power.²¹¹

Three years later, the California Court of Appeal upheld a warrantless

204. *Id.* at 16, 98 F.3d at 1516.

205. *Id.* at 16–17, 98 F.3d at 1516 (citing *Camara v. Mun. Court*, 387 U.S. 523, 539 (1967)) (connecting the slaughter of diseased cattle to the “risk of danger” exception). The court found the “risk of danger” exception inapplicable to the *Rohrig* facts. *Id.* at 23, 98 F.3d at 1519. However, the court continued to note that the list of exceptions to the warrant requirement is not “fixed and immutable.” *Id.* By referring back to the fundamental principles of warrant requirement exceptions, *id.* at 24–26, 98 F.3d at 1520–21, the court held that the search of defendant’s home, while not fitting into one of the recognized exceptions was still reasonable and, therefore, constitutional. *See id.* at 35, 98 F.3d at 1525. The loud music, at that time of morning, was recognized as a nuisance that in some circumstances the government has an interest in curtailing. *Id.* at 26, 98 F.3d at 1522.

206. 163 Cal. Rptr. 575 (Cal. Ct. App. 1980).

207. *Id.* at 576.

208. *Id.*

209. *Id.* at 577 (highlighting the importance of agriculture, the threat posed by the insects, and past success of the quarantine checkpoints).

210. *Id.* at 579.

211. *Id.* The Court of Appeals of Arizona reached the same conclusion on similar facts. *State v. Bailey*, 586 P.2d 648, 650 (Ariz. 1978).

search of a vehicle at a quarantine checkpoint on broader grounds. The Governor had quarantined three counties to contain and eradicate an infestation of the Mediterranean Fruit Fly, a threat to agriculture.²¹² The court noted that the warrant requirement was “simply incompatible with the success of the quarantine method of eradication.”²¹³ The emergency situation justifying the quarantine also justified the warrantless search power.²¹⁴

State courts have also considered warrantless search authority in relation to animal cruelty statutes. The Wisconsin Court of Appeals found a warrantless search and seizure, conducted on a farm to prevent further cruelty to horses, did not violate the Constitution.²¹⁵ In *State v. Bauer*,²¹⁶ the court tied the justification for the warrantless action to the compelling need to preserve the lives of the endangered horses.²¹⁷ It laid out a two-part test to determine if a warrantless search falls within the emergency exception: was the officer motivated by a need to render aid or assistance, and would a reasonable person under the circumstances have thought an emergency existed.²¹⁸

In *Commonwealth v. Hurd*,²¹⁹ another cruelty case, while deciding that the emergency exception did not extend to cover threats to animals, the Massachusetts Appeals Court noted, in broad terms, the applicability of the exception when the threat was posed by an animal.²²⁰ It found, “If a . . . dangerous animal presents an imminent threat of death or serious injury to persons, an animal control officer (or police officer) may enter premises without a warrant to remove the threat.”²²¹ While there is no indication that the court contemplated the potential transfer of disease as a source of the threat, the broad language supports the application of the emergency exception to the warrant requirement in the contagious animal disease

212. *People v. Guardado*, 194 Cal. Rptr. 598, 599 (Cal. Ct. App. 1983), *withdrawn* pursuant to Rule 976 of the California Rules of Appellate Procedure.

213. *Id.* at 601.

214. *Id.*

215. *State v. Bauer*, 379 N.W.2d 895, 899 (Wis. Ct. App. 1985). Decisions involving warrantless searches used to prevent animal cruelty do not consistently hold the power to search constitutional. In *Brinkley v. County of Flagler*, 769 So. 2d 468 (Fla. Dist. Ct. App. 2000), the Florida Court of Appeal upheld a warrantless search of a farm and seizure of animals when “any reasonable person would also have concluded that an urgent and immediate need for protective action was warranted.” *Id.* at 472. However, in *Commonwealth v. Hurd*, 743 N.E. 2d 841 (Mass. App. Ct. 2001), the Appeals Court of Massachusetts declined to recognize the extension of the emergency principle to animals. *Id.* at 846.

216. 379 N.W.2d 895 (Wis. Ct. App. 1985).

217. *Id.* at 898.

218. *Id.*

219. 743 N.E. 2d 841 (Mass. Ct. App. 2001).

220. *Id.* at 846.

221. *Id.*

context.

While not controlling decisions, other states' courts have handed down rulings that would support the constitutionality of S.B. 779 if the legislation were challenged in North Carolina courts. In general terms, these decisions have tied the constitutionality of a warrantless search to the emergency nature of the situation. In particular, courts have upheld the exercise of the emergency, warrantless search in the context of quarantines designed to protect agriculture. In addition, in a related scenario, addressed under the same rubric, courts have upheld searches when the emergency was the suffering of one animal—an emergency substantially less significant than a threat to the entire economy of the state. The reasoning of these opinions, especially when viewed collectively, demonstrates the constitutionality of the warrantless search power authorized in section 160-399.5.

C. *North Carolina Statutes*

Similar warrantless search and seizure powers are authorized in numerous North Carolina statutes.²²² For example, in emergencies, the state health director can demand the health records of persons potentially infected with a communicable disease without a warrant;²²³ fire departments are not required to seek warrants;²²⁴ hazardous waste and terrorist response teams can enter property without a warrant;²²⁵ and local governments may conduct warrantless searches while inspecting curfew violations.²²⁶ Warrantless searches related to agriculture have also been authorized within the inspection context.²²⁷ The existence of these statutes is not direct evidence of the constitutionality of the warrantless search power in the quarantine context but does demonstrate a history of linking the warrantless search power with emergency situations in North Carolina.

222. Some examples are from documents provided to the House Agriculture Committee. See *Control Foot & Mouth/Animal Disease Outbreaks: Hearing on S.B. 779 Before the Senate Agriculture/Environment/Natural Resources Committee*, 2001 Gen. Assem., Reg. Sess. (N.C. 2001).

223. N.C. GEN. STAT. § 130A-144(b) (2003).

224. *State v. Langley*, 64 N.C. App. 674, 678, 308 S.E.2d 445, 448 (1983) (interpreting N.C. GEN. STAT. § 58-82-1).

225. N.C. GEN. STAT. § 166A-25 (2004).

226. See *State v. Dobbins*, 277 N.C. 484, 501, 178 S.E.2d 449, 459 (1971) (holding that an officer has a reasonable belief that a person out after curfew, in violation of a local ordinance, is committing a misdemeanor in his presence).

227. See, e.g., N.C. GEN. STAT. § 106-65.71 (2004) (authorizing warrantless boll weevil eradication and inspection).

D. Conclusion

Section 106-399.5 authorizes the state veterinarian to conduct warrantless searches and seizures in emergency situations.²²⁸ This power is consistent with other North Carolina statutes and is within constitutional limits. The Supreme Court and lower courts recognize an “exigent circumstances” exception to the Constitution’s warrant requirement. The discovery of a contagious animal disease in livestock has been recognized as an emergency sufficient to justify warrantless searches.²²⁹ Warrantless searches are constitutional to the extent that they are a response to the threat posed.²³⁰ Section 106-399.5 allows the exercise of the warrantless search power only as a response to an emergency; therefore, any authorized warrantless search by the veterinarian falls within the “exigent circumstances” exception to the warrant requirement and is constitutional.

IV. THE EXPANDED QUARANTINE POWER

In addition to the power to conduct warrantless searches and seizures, the 2001 legislation increased the quarantine power of the state veterinarian. The quarantine power granted to the state veterinarian under section 106-401 differs significantly from the power previously vested in the office under 106-401*.²³¹ Whereas the veterinarian was previously allowed to quarantine only at the individual farm-level, the 2001 legislation grants the authority to quarantine “areas within the State.”²³² The imposition of a quarantine prohibits the movement of animals within the area and, especially, across the boundary of the defined area.²³³ Case law addressing the size of a quarantined area supports the validity of section

228. N.C. GEN. STAT. § 106-399.5 (2003).

229. See *Camara v. Mun. Court*, 387 U.S. 523, 539 (1967); *United States v. Rohrig*, 1996 FED App. 0346P, 16–17, 98 F.3d 1506, 1516 (6th Cir. 1996).

230. See, e.g., *State v. Nance*, 149 N.C. App. 734, 743–44, 562 S.E.2d 557, 564 (2002) (citing the need for immediate action as justification for the warrantless search); *State v. Bauer*, 379 N.W.2d 895, 898 (Wis. Ct. App. 1985) (citing the compelling need to preserve the life of the animal as justification for the warrantless search).

231. Because the legislation included a sunset provision, the statutes are reported in duplicate. When this Comment refers to the newly granted powers, effective *until* 2005, it will use the term “section 106-401.” When a comparison is needed, the old version, which will become effective in 2005, will be referred to as “section 106-401*.”

232. See Act of Apr. 4, 2001, ch. 12, sec. 2, § 106-401(b), 2001 Sess. Laws 14, 16 (codified as amended at N.C. GEN. STAT. § 106-401(b)) (adding the expanded quarantine power to the existing power). The original quarantine provisions of § 106-401* authorized quarantines of individual animals and contemplated a notice method based on individual premises. See *id.* § 106-401(a) (marking up the original statute with the new provisions of S.B. 779). This Comment recognizes that no provision in 106-401* prohibits quarantining a larger area by quarantining multiple contiguous, smaller areas. Whether this repeated use of 106-401* power achieves a result potentially outside legislative intent is beyond the scope of this Comment.

233. N.C. GEN. STAT. § 106-401 (2003).

106-401.

A. *Quarantine Power and Contagious Animal Diseases*

Courts have considered the constitutionality of quarantine authority used to contain the spread of animal diseases. The Supreme Court of North Carolina addressed the constitutionality of the quarantine power in 1947.²³⁴ *State v. Lovelace*²³⁵ involved state regulations intended to prevent the spread of brucellosis, also known as Bang's disease, in North Carolina.²³⁶ Brucellosis, a cattle disease, has features in common with FMD and MCD. The disease normally spreads animal-to-animal but can also be transferred to humans.²³⁷ Containment of the disease requires slaughter of the infected animal and often slaughter of the entire herd of cattle.²³⁸ The State Board of Agriculture authorized quarantine officers to arrest any person illegally importing cattle into North Carolina.²³⁹ The court upheld this particular cattle regulation and the power of the state in general to regulate agriculture as a means of containing contagious animal diseases.²⁴⁰ The court found that state regulations such as these, made under the police power, were not in conflict with the Federal Constitution as long as they are "reasonable in their scope and incidence"²⁴¹ and reasonably targeted to the desired end.²⁴² To this second point, the court noted that statutes should be assessed "in light of the evil sought to be remedied."²⁴³

In *Smith v. St. Louis*²⁴⁴ the United States Supreme Court upheld the constitutionality of a Texas quarantine system established to prevent the spread of anthrax in cattle. As in *Lovelace*, the Court tied the constitutionality of the state power directly to the situation requiring state action.²⁴⁵ The Court wrote:

Quarantine regulations cannot be the same for cattle as for persons, and must vary with the nature of the disease to be defended against. As the Supreme Court of Tennessee [*sic*] said: "The necessities of such cases often require prompt action. If too long delayed the end

234. *State v. Lovelace*, 228 N.C. 186, 45 S.E.2d 48 (1947).

235. *Id.*

236. *Id.* at 189, 45 S.E.2d at 50.

237. *Id.* at 189, 45 S.E.2d at 49.

238. *Id.* at 188-89, 45 S.E.2d at 49-50.

239. *See id.* (noting the authority of the State Board of Agriculture to make the regulation and the indictment of the defendant by quarantine officers).

240. *Id.* at 189-91, 45 S.E.2d at 50-51.

241. *Id.*

242. *Id.* at 190, 45 S.E.2d at 51.

243. *Id.*

244. 181 U.S. 248 (1901).

245. *See Smith v. St. Louis & Southwestern Ry. Co.*, 181 U.S. 248, 258 (1901) ("It is the character of the circumstances which gives or takes from a . . . quarantine a legal quality.").

to be attained by the exercise of the power to declare a quarantine may be defeated, and irreparable injury done.²⁴⁶

Smith and *Lovelace* demonstrate general judicial support for a broad quarantine power. These decisions establish an approach that assesses a particular quarantine in light of a particular threat. By adopting this method, the courts, as they do in the context of warrantless searches and seizures, link necessity and constitutionality. In general terms at least, as long as the exercise of the power remains within an acceptable scope, as defined by the nature of the threat, broad quarantine authority, such as the power authorized in section 106-401, is constitutional.

B. *Geographical Limitations on Quarantine Power*

Quarantines often, if not always, are implemented within defined geographical limits. Accordingly, challenges to the constitutionality of quarantines often center on the appropriateness of the geographical bounds. North Carolina's response to the threat posed by FMD and MCD includes authorizing the state veterinarian to quarantine "areas within the State."²⁴⁷ Prior to the 2001 legislation the state veterinarian's quarantine power was limited to quarantining individual premises.²⁴⁸ Two Supreme Court of North Carolina decisions support the constitutionality of the expanded quarantine provision. In 1906, the court in *State v. Southern Railway*

246. *Id.* at 257-58 (quoting *St. Louis Southwestern Ry. Co. v. Smith*, 49 S.W. 627, 632 (Tex. Civ. App. 1899)). The Supreme Court also upheld quarantine laws related to contagious animal diseases when challenged as being in violation of the Commerce Clause. *See, e.g.*, *Rasmussen v. Idaho*, 181 U.S. 198, 202 (1901) (upholding a statute prohibiting the importation of diseased sheep into Idaho); *Kimmish v. Ball*, 129 U.S. 217, 219-20 (1889) (finding constitutional a prohibition of cattle feared to be infected with Texas fever). A challenge based on a federal preemption argument has also failed. *Reid v. Colo.*, 187 U.S. 137, 147 (1902). However, it is important to note that there are limitations placed on state police power. Statutes that purport to protect the state from infectious diseases but are truly simple restraints on trade are unconstitutional. *R.R. Co. v. Husen*, 95 U.S. 465, 473-74 (1877). In general, the power to quarantine has often been recognized as a legitimate exercise of state power. *See, e.g.*, *Compagnie Francaise De Navigation A Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 387 (1902) ("[U]ntil Congress has exercised its power on the subject, such state quarantine laws and state laws for the purpose of preventing, eradicating or controlling the spread of contagious or infectious diseases, are not repugnant to the Constitution . . ."); *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824) ("They form a portion of that immense mass of legislation . . . not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description . . . are component parts of this mass."). *See* Edward A. Fallone, Note, *Preserving the Public Health: A Proposal to Quarantine Recalcitrant AIDS Carriers*, 68 B.U.L. REV. 441, 463-67 (1988), for further discussion of the constitutional issues surrounding the power to quarantine people.

247. N.C. GEN. STAT. § 106-401(b) (2003).

248. *See* Act of Apr. 4, 2001, ch. 12, sec. 2, § 106-401(a), 2001 Sess. Laws 14, 16 (marking up the original statute with S.B. 799's new provisions).

*Company*²⁴⁹ upheld the legitimacy of the quarantine power.²⁵⁰ Defendant was convicted of shipping cattle across the quarantine line established by the State Agriculture Commissioner.²⁵¹ The goal of the quarantine was the elimination of Spanish fever²⁵² and other contagious animal diseases.²⁵³ The authorizing legislation granted the Agriculture Commissioner the power to quarantine infected animals and regulate the transportation of livestock.²⁵⁴ The quarantine lines traced the political boundaries of counties, and the quarantine area consisted of a large portion of the state.²⁵⁵ The court held the creation of “cattle districts” to be a reasonable regulation, noting that the quarantine was “calculated to effectuate the end and purpose of the law.”²⁵⁶

In addition, *State v. Hodges*²⁵⁷ decided in 1920, also addressed state regulations aimed at the elimination of Spanish fever.²⁵⁸ The quarantine provision included broad language meant to allow the Agriculture Commissioner to target any infectious or contagious disease that could break out among livestock.²⁵⁹ The court noted that the “eradication of the cattle tick is a matter of national importance.”²⁶⁰ It documented, in particular, that ticks spread the disease animal-to-animal.²⁶¹ The court upheld the power of the state to authorize a quarantine encompassing entire counties and the power of the Agriculture Commissioner to implement the law.²⁶²

As these decisions relate to the power authorized by statute in 2001, they signal a judicial comfort with large quarantine districts. The significant change in the state veterinarian’s ability to quarantine—allowing larger “areas within the State” to be quarantined²⁶³—is within

249. 141 N.C. 846, 54 S.E. 294 (1906).

250. *Id.* at 850–52, 54 S.E. at 296.

251. *Id.* at 851, 54 S.E. at 296.

252. Spanish fever, often referred to as Texas fever, was a cattle disease passed from Texas cattle, which remained unaffected, to cattle from other geographic areas. See *The Handbook of Texas Online: Texas Fever*, at <http://www.tsha.utexas.edu/handbook/online/articles/view/TT/awt1.html> (last visited Nov. 29, 2004), for more information on Spanish fever (on file with the North Carolina Law Review).

253. *S. Ry. Co.*, 141 N.C. at 851–52, 54 S.E. at 296.

254. *Id.* at 850–51, 54 S.E. at 296.

255. See *id.* at 851, 54 S.E. at 296 (noting quarantine area defined by county lines).

256. *Id.* at 851–52, 54 S.E. at 296.

257. 180 N.C. 751, 105 S.E. 417 (1920).

258. *Id.* at 752–53, 105 S.E. at 417.

259. *Id.* at 751–52, 105 S.E. at 417–18.

260. *Id.* at 754, 105 S.E. at 418; see also *State v. Garner*, 158 N.C. 630, 631, 74 S.E. 458, 458–59 (1912) (upholding a conviction for allowing a cow to stray over the quarantine line and discussing the importance of the quarantine line in the effort to eradicate the cattle tick).

261. *Hodges*, 180 N.C. at 756, 105 S.E. at 420.

262. *Id.* at 753–54, 105 S.E. at 418.

263. Act of Apr. 4, 2001, ch. 12, sec. 2, § 106–401(b), 2001 N.C. Sess. Laws 14, 16 (codified

constitutional bounds according to North Carolina case law.

Federal decisions also directly support the constitutionality of the expanded quarantine power. *Empire Kosher Poultry, Inc. v. Hallowell*,²⁶⁴ a 1987 Third Circuit decision, directly addressed the constitutionality of state quarantine power in the context of contagious animal disease.²⁶⁵ Empire Kosher Poultry sought compensation for economic losses associated with a quarantine implemented by the Pennsylvania Agriculture Department.²⁶⁶ At issue was a quarantine enforced by the state due to the discovery of avian influenza.²⁶⁷ Avian influenza is a disease that affects poultry but not humans.²⁶⁸ Poultry that test positive for the disease are slaughtered to prevent further spread.²⁶⁹ The eradication program was necessary to save the ten billion dollar poultry industry.²⁷⁰ Initially, only the infected premises were quarantined, but containment of the highly contagious disease ultimately required the quarantine area to be extended to cover several counties.²⁷¹ The quarantine zone was expanded again one month later.²⁷²

Empire Kosher Poultry challenged the quarantine on substantive due process grounds.²⁷³ The substantive due process challenge was based on the relationship between the regulation and the regulatory goal. Empire Kosher Poultry argued that there was an inadequate rational relationship between the quarantine and protection of the industry.²⁷⁴ Among other arguments, the plaintiffs argued that the “geographical perimeters of the quarantine zone are too broad.”²⁷⁵ The court, however, found the argument to be “without merit.”²⁷⁶ It noted that the “boundaries were selected to cover areas of known infection and to include a five-mile buffer zone so that they could be readily identifiable, thereby avoiding poultry being

as amended at N.C. GEN. STAT. § 106-401(b)).

264. 816 F.2d 907 (3d Cir. 1987).

265. *Id.* at 909.

266. *Id.*

267. *Id.*

268. *Id.*

269. *See id.* at 911 (noting the destruction of a flock found to have avian influenza).

270. *Id.* at 909.

271. *Id.*

272. *Id.* at 910.

273. *Id.* at 912–13. A party arguing that a regulation or statute fails to comport with the substantive requirements of due process will prevail if it demonstrates “that there is no rational connection between the regulation and the interest which the regulation promotes.” *Id.* at 912 (citing *Harrah Indep. Sch. Dist. v. Martin*, 440 U.S. 194, 198 (1979) (per curiam); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976)).

274. *Empire Kosher Poultry, Inc.*, 816 F.2d at 912–13.

275. *Id.* at 913.

276. *Id.*

inadvertently shipped through or out of the quarantine areas."²⁷⁷ Finding that the size of the quarantine zone had a "real and substantial relation" to the object of the regulation and that the size was not unreasonable, the court held Pennsylvania exercised its quarantine power consistent with constitutional requirements.²⁷⁸

The constitutionality of the Pennsylvania avian influenza quarantine was again upheld in *Case v. United States Department of Agriculture*.²⁷⁹ The plaintiffs challenged the border and size of the quarantine area.²⁸⁰ The court found the quarantine rational, noting the importance of the state being able to easily identify the border, administer the quarantine zone, and avoid a "patchwork quarantine area."²⁸¹

The rationale of the federal district court is applicable in the MCD and FMD quarantine context. The *Case* and *Empire Kosher* courts assessed the constitutionality of the quarantine by considering the size of the quarantine in relation to both the significance of the threat and the requirements of a successful quarantine. Applying the courts' rationale to section 106-401 yields results identical to *Case* and *Empire Kosher Poultry*: the power to quarantine a large section of a state is not *per se* unconstitutional, and the constitutionality of a particular application of the power is judged in relation to its purpose and its administrative requirements.

Other state courts have also upheld the expanded quarantine power. In the 1899 case *St. Louis Southwestern Railway Company v. Smith*,²⁸² the Texas Court of Civil Appeals noted that the quarantine of cities during a contagious disease outbreak was an almost annual occurrence.²⁸³ *Smith v. State*,²⁸⁴ another Texas case, decided in 1914, upheld the validity of a statute authorizing the Texas Sanitary Commission to "establish, maintain and enforce quarantine lines wherever they deemed it necessary to protect the domestic animals of this State from Texas splenic fever and from all contagious and infectious diseases of a communicable character."²⁸⁵ In 1928, then-Judge Cardozo writing for the New York Court of Appeals in *People v. Teuscher*²⁸⁶ upheld a New York regulation in which the "plan of

277. *Id.*

278. *See id.* at 912-13 (setting forth the tests applied to a statute to determine its constitutionality under the Due Process Clause and holding that the state regulation in question was constitutional according to those guidelines).

279. 642 F. Supp. 341, 347 (M.D. Pa. 1986), *aff'd*, 829 F.2d 30 (3d Cir. 1987) (unpublished table decision).

280. *Id.* at 345.

281. *See id.* (quoting from defendants' brief).

282. 49 S.W. 627 (Tex. Civ. App. 1899).

283. *Id.* at 632.

284. 168 S.W. 522 (Tex. Crim. App. 1914).

285. *Id.*

286. 162 N.E. 484 (N.Y. 1928).

the statute [was] to make the township the territorial unit in the war upon unhealthy cattle."²⁸⁷ In describing an eradication plan using a county-based approach,²⁸⁸ he endorsed the power of the State to "establish such subdivisions as it chose in its war upon disease."²⁸⁹ In 1936, the Supreme Court of New Hampshire decided *Dederick v. Smith*.²⁹⁰ The New Hampshire court found a state statute authorizing the Agriculture Commissioner to establish quarantine zones within the state, even if the eradication approach divided the entire state into quarantine zones, to be "unobjectionable."²⁹¹ The court noted the connection between the statute's purpose, the eradication of bovine tuberculosis, and its means, the quarantine and testing powers.²⁹² It found that since such state powers were constitutional when only aimed to prevent economic harm, the powers must be constitutional when the targeted disease had the potential to infect humans.²⁹³

As the New York and New Hampshire examples indicate, other states' courts, even if the decisions are somewhat dated,²⁹⁴ have determined that quarantine statutes similar to section 106-401 were constitutional. The courts upheld the authorization of quarantine systems targeted to protect the livestock of the state even when the systems created large quarantine districts. Again, the constitutionality was based on the relationship between the purpose of the regulation and its approach. The aggressive quarantine approach was justified by the serious threat of a contagious animal disease. The justification was amplified when the disease posed a threat to human health.²⁹⁵ In the modern era, the threat posed by FMD and MCD is comparable; consequently, an aggressive quarantine approach authorizing the state veterinarian to quarantine large "areas within the State" is constitutional.

C. *The Quarantine Power: People, Animals, or Both?*

Before concluding, it is interesting to note that section 106-401(b) does not expressly authorize the state veterinarian to control the movement

287. *Id.* at 485.

288. *Id.* at 485-86.

289. *Id.* at 461, 162 N.E. at 486.

290. 184 A. 595 (N.H. 1936).

291. *Id.* at 599.

292. *Id.*

293. *Id.*

294. Many decisions noted in this section and other sections of this Comment were handed down in the early Twentieth Century or earlier. While not current, the decisions are especially relevant because they were made while the nation and each state were threatened by an outbreak of numerous contagious cattle diseases. The similarity between then and now makes the constitutional analysis relevant.

295. *Dederick*, 184 A. at 599.

of people.²⁹⁶ The statute notes:

As *part* of the quarantine under this subsection, the State Veterinarian or an authorized representative may enter any property in the State to examine any animal, to obtain blood and tissue samples for testing for the animal disease, and for any other reason directly related to preventing or controlling the animal disease, and may stop motor vehicles on a public or private road.²⁹⁷

The word “part” implies that the list of specific powers is not meant to be a complete list of the powers available under the general quarantine power. The first two listed powers pertain to the power to control animals, but the third power implies that the quarantine power can be used to control people.²⁹⁸

There is no definition of “quarantine” included in the Animal Disease article of section 106.²⁹⁹ The only time “quarantine” is directly defined in the North Carolina statutes is in section 130A-2(7a), which lays out a broad definition authorizing the control of both people and animals.³⁰⁰ Section 130A-2 introduces the definition by noting that “[t]he following definitions shall apply throughout this Chapter,” but does not expressly limit the applicability only to the Public Health chapter.³⁰¹ The quarantine definition of 130A-2 was added in 2002, after the expanded quarantine authority was granted to the state veterinarian.³⁰² The lack of a clear definition in section 106, the reference to the power to control vehicles, the provision of a partial rather than complete list of powers, and the later inclusion of the power to control people in the public health context, leaves open the question of whether, and if so, to what extent, the quarantine power authorized under section 106-401 includes the power to control people.³⁰³

296. N.C. GEN. STAT. § 106-401(b) (2003). The legislative intent to authorize the power to control animals is without dispute. *See id.* (“No animal subject to the quarantine shall be moved to any other premises.” (emphasis added)). Surrounding statutes also support this conclusion. *See id.* § 106-400.1 (authorizing the state veterinarian to quarantine swine); *id.* § 106-401.1 (authorizing the state veterinarian to quarantine poultry).

297. *Id.* § 106-401(b) (emphasis added).

298. *See id.* (establishing the power to stop motor vehicles).

299. *See id.* §§ 106-304 to 106-405.20 (including no quarantine definition).

300. *Id.* § 130A-2(7a) (defining quarantine as it applies, at least, to the power of the state health director).

301. *Id.* § 130A-2.

302. Act of Oct. 3, 2002, ch. 179, sec. 4, § 130A-2(7a), 2002 N.C. Sess. Laws 803, 808 (codified as amended at N.C. GEN. STAT. § 130A-2(7A) (defining “quarantine authority”).

303. This Comment does not address the issue of whether the constitutionality of the quarantine power is impacted by whether it controls the movement of people whose actions do not bring them into contact with livestock. The Raleigh *News & Observer's* description of the state's potential reaction clearly contemplates a quarantine that regulates the movement of people. *See supra* note 162 and accompanying text. If this is the case, constitutional analysis would have to consider whether due process protection for liberty, not just property, impacts the

D. Conclusion

The expanded quarantine power—the power to quarantine large areas of the state as opposed to individual premises—was a controversial aspect of the 2001 legislation. Nevertheless, the expanded power is constitutional. When challenged in the courts based on their size, large quarantine areas have been upheld. Courts have based their holdings on the reasonableness of the area in relation to the threat posed by the disease.³⁰⁴ As long as the regulation is found to be reasonable and connected to the threat, the language from *Smith v. State*³⁰⁵ expresses the general approach of both federal and state courts: states may “establish, maintain and enforce quarantine lines wherever they [deem] it necessary.”³⁰⁶ Threats to livestock have been judicially recognized as significant enough to justify the quarantine power.³⁰⁷ They have been cited as justification for quarantines that encompass entire counties, and sometimes states.³⁰⁸

The power granted under section 106-401 would survive a constitutional challenge given the existing case law. The threat posed by MCD and FMD is sufficiently similar to, if not greater than,³⁰⁹ the threats previously addressed in litigation. Moreover, the size of the quarantine districts already litigated is comparable to the size envisioned by the state veterinarian.³¹⁰

V. THE POWER TO DESTROY LIVESTOCK WITHOUT NOTICE

An early amendment to S.B. 779 added the power to destroy livestock without notice.³¹¹ As amended, S.B. 779 reads, “In the event the owner of the animal and the owner or operator of the premises cannot be notified, the State Veterinarian or an authorized representative may seize *and destroy*

constitutionality of the quarantine provision or its exercise.

304. See, e.g., *State v. S. Ry. Co.*, 141 N.C. 846, 851–52, 54 S.E. 294, 296 (1906) (noting the quarantine was reasonably calculated to effectuate the purpose of the law); see also *Empire Kosher Poultry v. Hallowell*, 816 F.2d 907, 912–13 (3d Cir. 1987) (finding the state regulation constitutional based on the reasonableness of the quarantine area).

305. 168 S.W. 522 (Tex. Crim. App. 1914).

306. *Id.* at 522.

307. See, e.g., *Dederick v. Smith*, 184 A. 595, 599 (N.H. 1936) (finding eradication of bovine tuberculosis sufficient justification).

308. See, e.g., *State v. Lovelace*, 228 N.C. 186, 189, 45 S.E.2d 48, 50 (1947) (endorsing a quarantine used to keep infected cattle out of North Carolina); *People v. Teuscher*, 162 N.E. 484, 486 (N.Y. 1928) (supporting a county-based eradication plan).

309. FMD and MCD require the slaughtering of infected cattle, whereas “cattle tick” does not. See *United States v. Russell*, 95 F.2d 684, 684 (5th Cir. 1938) (describing the process by which ticks are removed from cattle).

310. See *supra* Part IV.B.

311. *Control Foot & Mouth/Animal Disease Outbreaks: Hearing on S.B. 779 Before the Senate Agriculture/Environment/Natural Resources Committee*, 2001 Gen. Assem., Reg. Sess. (N.C. 2001) (amendment proposed by Rep. Albertson).

the animal.”³¹² More than the other powers of S.B. 779, the power to seize, and especially to destroy, livestock raises questions of government deprivation of private property.³¹³ Therefore, constitutional questions surrounding the controversial power to destroy livestock without notice center on the Fourteenth Amendment’s requirement that citizens not be deprived of property without due process. Case law indicates that allowing destruction without notification is within the constitutional boundaries that limit legislative action. Moreover, comparable North Carolina statutes authorize similar powers.

A. *Slaughter Without Notice*

Only one North Carolina decision concerns the power to destroy livestock without notice. In *Hellen v. Noe*,³¹⁴ decided in 1843, the Supreme Court of North Carolina upheld the validity of a local ordinance authorizing the constable to seize hogs running at large in the town.³¹⁵ The hogs were considered a nuisance.³¹⁶ The court found that running a public advertisement and the “distress of the property” were sufficient to provide notice before selling the hog.³¹⁷ “Personal notice” was not necessary.³¹⁸

Clearly, the power to destroy livestock without notice has not been given extensive treatment by North Carolina courts, but the slight treatment it has received supports the conclusion that destruction of livestock posing a nuisance, without personal notice, is within constitutional bounds. The destruction of livestock posing a more serious threat, as is the case with FMD or MCD, would be supported by the same logic.

In contrast to the weak support found in North Carolina case law, the United States Supreme Court in 1908 provided the strongest support for the power to slaughter a potentially infected animal without giving prior notice to the owner. The Court in *North American Cold Storage v. Chicago*³¹⁹

312. Act of Apr. 4, 2001, ch. 12, sec. 3, § 106-402.1(b), N.C. Sess. Laws 14, 18 (codified as amended at N.C. GEN. STAT. § 106-402.1(b)) (emphasis added).

313. S.B. 779 includes powers that when exercised deprive individuals of liberty and private property. Each of the three controversial powers in some way involves some deprivation. In simple terms, the quarantine power deprives individuals of liberty, the warrantless search and seizure power deprives individuals of both liberty and property, and the power to destroy livestock deprives individuals of private property.

314. 25 N.C. (3 Ired.) 493 (1843).

315. *Id.* at 499.

316. *See id.* at 499–500 (discussing an ordinance authorizing the collection of loose hogs).

317. *Id.*

318. *Id.* *State v. Harrell*, 203 N.C. 210, 165 S.E. 551 (1932), supports this conclusion. *Harrell* noted the validity of local ordinances directing local marshals to “kill all dogs found running at large,” but it did not discuss a notice requirement. *See id.* at 215, 165 S.E. at 553 (noting the Marshall’s power to slaughter without attempting to contact the owners).

319. 211 U.S. 306 (1908).

upheld the city of Chicago's power to seize and destroy "unwholesome or putrid food" without first notifying the owner.³²⁰ The Court held that the exercise of the police power by the city was not in conflict with the Due Process Clause of the Fourteenth Amendment.³²¹ It found that the unwholesome food was a threat to the health and lives of the citizens.³²² Summary destruction without notice, therefore, was justified as a means of preventing the danger posed by its existence.³²³ This principle both validated earlier state court decisions³²⁴ and provided the constitutional foundation for decisions that followed.³²⁵

Thirty years later, the holding in *North American Cold Storage* was applied in the animal disease context. In *Aguiar v. Brock*,³²⁶ 300 Californian cattle farmers challenged the constitutionality of the state bovine tuberculosis eradication statute that authorized the slaughter of infected cattle.³²⁷ The federal district court, directly citing *North American Cold Storage*, found that notice was not constitutionally required.³²⁸ Whether notice was required prior to destruction was a discretionary matter to be determined by the California legislature.³²⁹

As *Aguiar* illustrates, federal decisions defend the constitutionality of the authorization to slaughter potentially infected animals without notifying the owner. In a situation similar to an FMD or MCD outbreak, a federal district court in *Aguiar* found the reasoning of *North American Cold Storage* applicable: if the animals posed a threat to the health and safety of the community they could be destroyed without notice. Applying this rationale in the case of FMD or MCD supports finding both the 2001 legislation empowering the veterinarian to destroy the animal and the actual destruction of the potentially infected animal constitutional.

In cases decided both before and after *North American Cold Storage*, numerous state courts have held that notice is not required before

320. *See id.* 315–16 (comparing the case at bar with earlier decisions and declaring "it is proper to provide that food which is unfit for human consumption should be summarily seized and destroyed"). The Court discusses the requirement of both notice and hearing in this opinion. *Id.* at 317, 320. The Court's holding applies equally to both procedures.

321. *Id.* at 320.

322. *See id.* at 315 (noting the threat of unwholesome food).

323. *Id.* at 320.

324. *See infra* notes 330–36 and accompanying text.

325. *See infra* notes 337–47 and accompanying text.

326. 24 F. Supp. 692 (S.D. Cal. 1938).

327. *Id.* at 692.

328. *Id.* at 694–95.

329. *Id.* at 694. The Fourth Circuit decided an animal destruction case more recently. In *Altman v. High Point*, 330 F.3d 194 (4th Cir. 2003), the court upheld the killing of a stray dog. *Id.* at 207. Plaintiff claimed that the killing of a pet dog was in violation of the Fourth Amendment, as opposed to the Fourteenth Amendment, which the cases in the text concern. *Id.* at 199.

destruction of an animal posing a public threat. In 1888, the Supreme Court of New Jersey in *Newark and South Orange Horse Railway Company v. Hunt*³³⁰ considered a state statute authorizing the board of health to destroy “all animals having contagious or infectious diseases.”³³¹ The court found that the Fourteenth Amendment did not require notice prior to destruction.³³² Three years later, the Supreme Court of Massachusetts issued a similar decision in *Miller v. Horton*,³³³ a case in which a plaintiff sued for damages stemming from the killing of his horse.³³⁴ The horse was slaughtered after being diagnosed with glanders.³³⁵ Then-State Supreme Court Justice Oliver Wendell Holmes noted the state’s power to destroy infected animals in emergencies.³³⁶

Opinions handed down after *North American Cold Storage* continued to support the power to destroy without notification. The Supreme Court of Iowa upheld the state power on numerous occasions. The court in 1913 in *Waud v. Crawford*³³⁷ commented that in the case of a horse infected with a contagious disease, the horse may be destroyed under the police power, “without notice . . . to prevent the spread of contagious diseases.”³³⁸ Thirteen years later, the court considered a state attempt to eradicate bovine tuberculosis in *Fevold v. Webster County*.³³⁹ The eradication approach required the slaughter of infected cattle.³⁴⁰ The court found that the legislature was not required to give cattle owners notice prior to destruction.³⁴¹ In *Peverill v. Board of Supervisors*,³⁴² decided in 1929, the court found that the testing of cattle and the destruction of infected cattle

330. 12 A. 697 (N.J. 1888).

331. *Id.* at 699.

332. *Id.* at 700–01.

333. 26 N.E. 100 (Mass. 1891). *Miller* is cited as support for the holding in *North American Cold Storage*. N. Am. Cold Storage v. Chicago, 211 U.S. 306, 318 (1908).

334. *Miller*, 26 N.E. at 100.

335. *Id.* Glanders is a sometimes-fatal disease that is traditionally found in horses and their relatives. See *Glanders: Essential Data*, at <http://www.cbwinfo.com/Biological/Pathogens/BMa.html> (last visited Nov. 29, 2004), for more information on glanders (on file with the North Carolina Law Review).

336. *Miller*, 26 N.E. at 101. Justice Holmes endorsed a post-slaughter hearing where the state would pay the owner if the animal was found not to be diseased. *Id.* This Comment does not address whether post-slaughter hearings are required under the Due Process Clause or whether compensation, if available under the statute or required by the Constitution, should be based on the animal’s actual health or the reasonableness of the state’s action.

337. 141 N.W. 1041 (Iowa 1913).

338. See *id.* at 1041 (finding that the police power could be exercised to fight contagious diseases).

339. 210 N.W. 139 (Iowa 1926).

340. See *id.* at 140 (1926) (noting that some cattle would be “found advisable to slaughter”).

341. *Id.* at 144.

342. 222 N.W. 535 (Iowa 1929).

“without notice” was within the police power of the state.³⁴³ This case also concerned the Iowa bovine tuberculosis statute.³⁴⁴ In addition, the California Court of Appeal in 1938 decided *Affonso Brothers v. Brock*.³⁴⁵ Eight hundred cattle owners challenged the constitutionality of a California statute that authorized the destruction of cattle infected with bovine tuberculosis.³⁴⁶ The court, in no uncertain terms, held:

Since the bovine tuberculosis statute is a valid exercise of the police power enacted to preserve public health and welfare, the . . . summary slaughter of diseased dairy cattle, without previous notice . . . is lawful. Such summary destruction of diseased cattle is not a violation of the due process clause of the federal or state Constitution³⁴⁷

Like the sole North Carolina case and the federal opinions, decisions from other states support the constitutionality of the summary destruction power. In each instance noted above, courts have resolved the constitutional challenge in favor of allowing the particular destruction regulation to remain in place. Powers similar to the North Carolina state veterinarian’s power to destroy infected, or potentially infected, livestock without notice have been consistently held constitutional. The authority included in the 2001 legislation should be viewed similarly.

B. North Carolina Statutes

While North Carolina decisions have not dealt extensively with the issue of notice, there are a few North Carolina statutes concerning the destruction of animals during an emergency or animals posing a health threat. Although these statutes do not impact the constitutionality of the new power to destroy livestock without notice, they demonstrate a history of authorizing the exercise of similar power. For example, the state veterinarian is authorized under section 106-307.7 to order the appropriate local sheriff or other officer to kill any livestock roaming at large and suspected of being infected with a contagious disease once it has been determined that the livestock cannot be captured.³⁴⁸ The statute does not

343. *Id.* at 541; *see also* Loftus v. Dep’t of Agric. of Iowa, 232 N.W. 412, 418 (Iowa 1930) (considering again the bovine tuberculosis law and affirming *Pevevill*).

344. *Pevevill*, 222 N.W. at 540.

345. 84 P.2d 515 (Cal. Dist. Ct. App. 1938).

346. *Id.* at 517.

347. *Id.* at 519; *see also* Stickley v. Givens, 11 S.E.2d 631, 638 (Va. 1940) (considering the abatement of nuisances and finding no constitutional rights other than those granted under the state statute); Durand v. Dyson, 111 N.E. 143, 146 (Ill. 1915) (holding hearings, a procedure often associated with notice, are not required prior to destruction of infected cattle).

348. N.C. GEN. STAT. § 106-307.7 (2003).

require that the owner of the livestock be notified or that the veterinarian or sheriff attempt to notify the owner.³⁴⁹ Additionally, veterinarians are required by section 130A-199³⁵⁰ to destroy animals diagnosed with rabies. That statute also provides no mention of notice.³⁵¹ In a similar situation, section 130A-195 authorizes the destruction of "uncontrolled dogs and cats" during a rabies quarantine without requiring notification.³⁵² In contrast, outside the emergency setting, under section 160A-186, domestic animals running at large in violation of a city ordinance may only be destroyed "after reasonable efforts to notify their owner."³⁵³

C. Conclusion

Destroying potentially infected animals without notice is a constitutional exercise of state police power. The emergency situation contemplated in the North Carolina contagious disease response legislation is analogous to the situation considered in *North American Cold Storage*. For example, an animal infected with FMD can potentially spread the disease (the public harm) simply by being alive and coming in contact with other animals. Containment does not end the threat. In *North American Cold Storage*, the consumption of spoiled food (the public harm)³⁵⁴ could theoretically be prevented by successful segregation of the property posing the threat. Nevertheless, the Court upheld the power to destroy the property without notice.³⁵⁵ With regard to contagious animal diseases, the power to destroy without notice is, at least, equally justified since successful segregation is not a guaranteed solution.

Moreover, in both situations, notifying the owner of the threatening property would not change the outcome. Presumably, the spoiled food at issue in *North American Cold Storage* was going to be destroyed regardless of notice. Similarly, once diagnosed as infected or potentially infected, the animal will be destroyed. The inevitability of destruction present in both cases supports the applicability of the "no notice required" principle of *North American Cold Storage* in the contagious animal situation.

While North Carolina courts have dealt little with the requirement of notice before destruction of animals, other state courts have. These courts have judged the power of the state to destroy potentially infected animals without notice as being consistent with the Due Process Clause.

349. *See id.*

350. *Id.* § 130A-199.

351. *See id.*

352. *Id.* § 130A-195.

353. *Id.* § 160A-186.

354. *See N. Am. Cold Storage v. Chicago*, 211 U.S. 306, 315 (1908).

355. *Id.* at 320.

Authorizing the destruction of livestock without notice is within the bounds of the Constitution.

VI. THE TRIGGERING PROVISION

The state veterinarian is authorized to exercise the powers granted by the 2001 legislation only if three conditions are met: the threat posed by the animal disease must rise to the designated level, the veterinarian must consult with the Agriculture Commissioner, and the Governor must give his approval.³⁵⁶ The threat level is denoted as “an imminent threat within the State of a contagious animal disease that has the potential for very serious and rapid spread, is of serious socioeconomic and public health consequence, or is of major importance in the international trade of animals and animal products”³⁵⁷ The potential economic damage theoretically associated with an FMD or MCD outbreak satisfies the damage element.³⁵⁸ The contagious nature of both diseases meets the requirement of a potentially rapid spread.³⁵⁹ In addition, the vague nature of consultation indicates that the second element would be easily met in an emergency.³⁶⁰

The third aspect of the triggering provision carries with it more controversy and questions. The Section below will concentrate on the fundamental issue of whether the state veterinarian should be allowed to act after simply consulting with the Governor or whether actual approval should be required.³⁶¹ As an examination of other North Carolina statutes, case law, and policy considerations demonstrate, the decision to require approval was appropriate.

A. Authorization to Act

It is useful to initially note the nature of the Governor’s approval. The statute reads: “When determined by the State Veterinarian, in consultation with the Commissioner of Agriculture and with the approval of the Governor, that there is an imminent threat”³⁶² The Governor is asked

356. See, e.g., N.C. GEN. STAT. § 106-399.4 (2003). Although created by different sections, the new powers discussed in Parts III, IV, and V are triggered by the same language. See Act of Apr. 4, 2001, ch. 12, 2001 N.C. Sess. Laws 14 (codified as amended in scattered sections of N.C. GEN. STAT. § 106).

357. *Id.*

358. See *supra* Part I.C–E.

359. See N.C. CHART, *supra* note 18.

360. This Comment does not explore the level of communication between two officials required to qualify as “consultation.” Instead, the analysis below operates under the simple principle that “consultation” does not require an affirmative response from the official being consulted, as approval would. Accordingly, it is a less stringent standard for a communication to meet and, therefore, does not significantly delay the decisionmaking of the state veterinarian.

361. This Comment does not distinguish between the Governor and the Governor’s designee.

362. Act of Apr. 4, 2001, ch. 12, sec. 1, § 106-399.4(a), 2001 N.C. Sess. Laws 14, 14

to approve the recognition of the threat condition, not the veterinarian's decision to exercise the powers. Certainly the General Assembly contemplated the rapid execution of the powers once approval is given, but from a technical standpoint the approval is essentially the final authorizing step, after which the veterinarian is allowed to operate as she sees fit.³⁶³

This interpretation is consistent with the remaining language of the statute. The approval provision is included in the beginning of the statute, qualifying the determination of the state veterinarian.³⁶⁴ But once the state veterinarian has received approval, she "may," for example, under section 106-401, exercise the quarantine power.³⁶⁵ Discretion is vested entirely in the state veterinarian.

This interpretation is also consistent with the approach taken in earlier parts of section 106. Sections 106.304 through 106.306 lay out the procedure by which the Governor may prohibit the importation of potentially infected livestock and materials dangerous to livestock.³⁶⁶ Section 106.304 and section 106.305 authorize the Governor, upon a recommendation from the Agriculture Commissioner, to "issue his proclamation" prohibiting the imports.³⁶⁷ Once the proclamation is issued, however, the Agriculture Commissioner is empowered to make the rules and regulations required for containment.³⁶⁸ This approach is identical to that chosen in the 2001 legislation: the Governor first validates the executive agent's assessment of the situation, *then* the agent crafts and implements the containment policy under her own discretion.

B. North Carolina Statutes

The distinction between requiring approval and consultation was an important one for the General Assembly because inherent within the choice between the two are larger questions regarding the role of the Governor in a crisis and the balance between efficiency and accountability. The first step in assessing the decision to require approval rather than consultation is to examine other North Carolina statutes that expressly require either approval or consultation. North Carolina statutes rarely mandate *consultation* with the Governor. Executive branch officials must consult the Governor in one

(codified as amended at N.C. GEN. STAT. § 106-399.4(a)).

363. This Comment does not address whether the benefits of vesting sole discretion in the state veterinarian—such as increased efficiency in the emergency situation—outweigh the costs of vesting one official with unchecked authority.

364. *Id.*

365. Act of Apr. 4, 2001, ch. 12, sec. 2, § 106-401(a), 2001 N.C. Sess. Laws 14, 15–16 (codified as amended at N.C. GEN. STAT. § 106-401(a)).

366. See N.C. GEN. STAT. §§ 106.304 to 106.306 (2003).

367. *Id.* §§ 106.304, 106.305.

368. *Id.* § 106.306.

appointment context³⁶⁹ and prior to the publication of his official papers.³⁷⁰ Neither example is comparable to the contagious animal disease legislation. More important to this Comment, however, are two statutes requiring *the Governor to consult with the General Assembly* in times of crisis. The first, section 113B-22, concerns the response to an energy crisis.³⁷¹ The Governor is not allowed to implement the energy emergency response programs without first consulting with the prescribed legislative committee unless the committee fails to act within forty-eight hours after the submission of the plans.³⁷² Yet, if a majority of the Council of State finds the crisis to be of such “immediacy as to make delay for legislative review cause for probable harm to the public,” the Governor may act prior to consultation and before the expiration of the forty-eight-hour period.³⁷³ In a similar manner, the Governor is required to consult the Joint Legislative Commission on Governmental Operations prior to allocating money from the Contingency and Emergency Fund.³⁷⁴ However, the statute then qualifies the requirement:

Notwithstanding the provisions of this subdivision or any other provision of law requiring prior consultation by the Governor with the Commission, whenever an expenditure is required because of an emergency that poses an imminent threat to public health or public safety, and is . . . [the result of a natural event] . . . the Governor may take action under this subsection without consulting the Commission if the action is determined by the Governor to be related to the emergency.³⁷⁵

Both emergency response statutes, while requiring consultation, actually vest the emergency response power in the Governor—in one case to act on his own volition and in the other with a majority of the Council of State.

Statutes requiring the Governor to *approve* executive action are much more common. Express approval is often required for executive appointments,³⁷⁶ financial agreements signed by the state,³⁷⁷ the hiring of

369. *See id.* § 108A-29(q) (“The Chairman . . . shall appoint the State Job Service Employer Committee members after consultation with the Governor.”).

370. *See id.* § 121-6(b) (requiring consultation with the Governor when determining how many copies of the Governor’s papers and other official releases shall be printed).

371. *See id.* § 113B-22.

372. *Id.* § 113B-22(b). Examples of emergency responses are included in the statute. *See id.* § 113B-22(d).

373. *Id.*

374. *Id.* § 120-76(8)(a).

375. *Id.* § 120-76.

376. *See, e.g.,* N.C. GEN. STAT. § 53-148 (2003) (requiring the Governor’s approval before appointment of bank conservators); *id.* § 95-3 (mandating the Governor’s approval before appointment of chief administrative officers of the Department of Labor).

377. *See, e.g., id.* § 74-68 (requiring the Governor’s approval before the Department of

private legal counsel by the state,³⁷⁸ and the exercising of the power of eminent domain³⁷⁹ or transferring land to a private entity.³⁸⁰ Approval of the Governor is required in some emergency situations.³⁸¹ The State Treasurer is only authorized to make emergency, short-term notes with approval of the Governor and Council of State.³⁸² Only with the approval of the Governor may the Commissioner of Banks exercise his emergency power to limit the amount of money that may be withdrawn from bank accounts.³⁸³ Chief executives of political subdivisions are allowed to negotiate emergency "mutual aid agreements" with other cities and states, but only with the Governor's approval.³⁸⁴ In the case of an environmental emergency, the Governor must concur in the decision of the Secretary of the Department of Environment and Natural Resources before the Secretary is empowered to order the allegedly polluting entity to reduce or discontinue the polluting emissions.³⁸⁵ As a component of the state's response to contagious animal diseases, section 106-308 requires the approval of the Governor before the Budget Director can transfer funds by emergency provision to fight or prevent an outbreak of FMD or other threatening, infectious disease.³⁸⁶

The most notable exception to vesting executive control in an emergency in the Governor, and a useful parallel to the quarantine power authorized under section 106-401, is the quarantine power of the state health director.³⁸⁷ In an emergency, the health director does not have to consult with the Governor before acting.³⁸⁸ The health director has

Natural Resources seeks, accepts, or spends federal grants); *id.* § 146-17.1(a) (requiring the Department of Administration to receive the Governor's approval before paying a private party for information leading to the reclamation of state land); *id.* § 18B-208(a) (authorizing the ABC Commission to issue bonds with the Governor's approval).

378. *See id.* § 62-48(b) ("The [Utilities] Commission may . . . employ, subject to the approval of the Governor, private legal counsel . . .").

379. *See, e.g., id.* § 143-341(4)(d) (authorizing the "power of eminent domain . . . subject to the approval of the Governor . . ."); *id.* § 146-24.1 (providing that all bonds acquired via the power of eminent domain must have approval of the Governor).

380. *See, e.g., id.* § 143-341(4)(e) ("Any conveyance of land made . . . without the approval of the governor . . . is voidable.").

381. In emergency situations, the executive power is primarily vested in the Governor. *See id.* § 166A-5. However, the analysis in this section focuses on emergency situations where another executive agent is authorized to act but required to seek approval prior to acting.

382. *Id.* § 147-70.

383. *Id.* § 54B-125; *id.* § 54C-87.

384. *See id.* § 166A-10(c).

385. *See id.* § 143-215.3(a)(12).

386. *See id.* § 106-308.

387. *See id.* § 130A-145(a).

388. *See id.* § 130A-145 (omitting any requirement comparable to the approval provision in the contagious animal disease statutes).

“isolation authority” and “quarantine authority.”³⁸⁹ “Isolation authority,” simply put, is the power to isolate an infected individual person or animal.³⁹⁰ “Quarantine authority” is the power to restrict the movement of multiple potentially infected persons or animals.³⁹¹ When the powers are exercised in response to an animal disease that may be passed to humans, the health director must *consult* with the state veterinarian, but neither the approval of the state veterinarian nor the Governor’s *approval* is required prior to implementation.³⁹²

C. *Approval of the Governor: Case Law*

North Carolina courts have addressed similar gubernatorial approval provisions. In *North Carolina State Ports Authority v. Southern Felt Corporation*,³⁹³ the Court of Appeals of North Carolina held that failure to seek and affirmatively plead prior approval of the Governor prohibited the state port authority from exercising the power of eminent domain otherwise granted to it.³⁹⁴ It endorsed Supreme Court of North Carolina decisions *Redevelopment Commission v. Hagins*³⁹⁵ and *Durham and Northern Railroad Company v. Richmond and Danville Railroad Company*,³⁹⁶ which held that statutes depriving citizens of property should be strictly construed.³⁹⁷ When included in a statute, especially one authorizing the power to deprive a citizen of property or liberty, the prior approval of the Governor must be sought.³⁹⁸

The Supreme Court of North Carolina in *Frye Regional Medical Center v. Hunt*³⁹⁹ defined, in part, the nature of the Governor’s approval power. In *Frye Regional*, plaintiffs challenged the power of the Governor to amend policies submitted for his approval.⁴⁰⁰ As was required by law, the annual State Medical Facilities Plan had been submitted for the Governor’s approval.⁴⁰¹ Instead of outright approval, the Governor

389. *Id.* § 130A-145(a).

390. *Id.* § 130A-2(3a).

391. *Id.* § 130A-2(7a) (defining “quarantine authority,” in part, as restricting the movement of animals or people that “have been exposed to or are reasonably suspected of having been exposed to a communicable disease”).

392. *See id.* § 130A-145(c).

393. 1 N.C. App. 231, 161 S.E.2d 47 (1968).

394. *Id.* at 232–34, 161 S.E.2d at 49–50.

395. 258 N.C. 220, 128 S.E.2d 391 (1962).

396. 106 N.C. 42, 10 S.E. 1041 (1890).

397. *See Redevelopment Comm’n v. Hagins*, 258 N.C. 220, 224–25, 128 S.E.2d 391, 394 (quoting *Durham & N. R.R. Co. v. Richmond & Danville R.R. Co.*, 106 N.C. 42, 48–49, 10 S.E. 1041, 1042–43 (1890)).

398. *N.C. State Ports Auth. v. S. Felt Corp.*, 1 N.C. App. 231, 233, 161 S.E.2d 47, 49 (1968).

399. 350 N.C. 39, 510 S.E.2d 159 (1999).

400. *Id.* at 40, 510 S.E.2d at 160.

401. *Id.* at 40, 510 S.E.2d at 161.

amended the plan prior to approving it.⁴⁰² Plaintiff challenged the legality of the Governor's action. The court found that the power to approve a state policy included the power to amend that policy prior to approval⁴⁰³ and that the approval authority was not identical to the veto (i.e., an "up or down" vote) authority.⁴⁰⁴ *Frye Regional*, like *Southern Felt*, recognizes the critical role of gubernatorial approval.

D. *Approval of the Governor: Policy Analysis*

From a policy standpoint, the question is *should* the General Assembly require the state veterinarian receive the Governor's approval of the threat assessment prior to implementing the state's contagious animal disease policy, as opposed to, *can*, from a legal standpoint, the General Assembly impose this restriction. In addressing the policy question, the issues surrounding the requirement should first be highlighted. Response speed is an important factor. Given the contagious nature of the diseases, the state policy should aim to contain a potentially infected animal as fast as possible. The slower the response to an infected animal, the more likely an outbreak is to occur.⁴⁰⁵

In addition, the state policy should emphasize accuracy. The three controversial powers detailed above, regardless of justification, are extreme invasions on the rights of individuals. Exercising those powers without cause should be avoided. The "trigger provision" is the only section in the statute that slows, and can possibly prevent, the implementation of the response plan. Accordingly, it can be used to confirm the existence of the threat before implementation.

The state policy should also maximize accountability. With the potential for a great exercise of police power, citizens should be able to hold the government accountable. Moreover, the General Assembly and executive officials can use North Carolina citizens' political response as a means to judge the appropriateness of the animal disease response, should the policy ever need to be implemented again or an election occur while the powers are being exercised.⁴⁰⁶

E. *Conclusion*

The General Assembly justifiably required the state veterinarian to

402. *Id.*

403. *Id.* at 47, 510 S.E.2d at 164.

404. *Frye Reg'l Med. Ctr. v. Hunt*, 350 N.C. 39, 43, 510 S.E.2d 159, 162 (1999).

405. See *supra* notes 22-24 and accompanying text (discussing the contagious nature of FMD).

406. Depending on the difficulty associated with identifying and containing a disease, there is no upper limit on the duration of an eradication program.

receive the Governor's approval rather than simply consult with the Governor when determining if the threat level is sufficient to "trigger" the executive response articulated in S.B. 779. The decision to require approval is consistent with other North Carolina statutes.⁴⁰⁷ North Carolina looks to its Governor in times of crisis and places the responsibility for crisis management in the Executive's hands.⁴⁰⁸ In particular, approval of the Governor is already required to financially respond to an FMD crisis.⁴⁰⁹ Requiring approval in the contagious animal disease context is consistent with this established approach.

The little existing case law regarding the approval power also supports this decision. Both *Frye* and *Southern Felt* highlight the importance of the approval power—viewing it as a role in the policy-making process, not simply an unimportant formality.⁴¹⁰

As noted earlier, the state health director does not have to receive approval before exercising quarantine authority when a contagious animal disease could potentially be passed to humans.⁴¹¹ Requiring the state veterinarian to seek approval simply notes the difference between the two crises: a health crisis poses a direct threat to human health, whereas, a contagious animal disease poses, primarily, an economic threat.⁴¹² The choice to require approval in one situation and not the other is a policy decision.⁴¹³

The policy analysis concerns three criteria: the speed of the response, the accuracy of the determination, and the accountability of the government officials. Even in the age where technology makes nearly-instant communication with anyone possible, requiring gubernatorial approval

407. *But see supra* notes 387–92, *infra* notes 411–13 and accompanying text (noting the state health director does not have to receive approval in comparable situations).

408. *See, e.g.*, N.C. GEN. STAT. § 166A-5 (2003) (vesting emergency powers in Governor).

409. *Id.* § 106-308.

410. *See Frye Reg'l Med. Ctr. v. Hunt*, 350 N.C. 39, 43, 510 S.E.2d 159, 162 (1999) (noting that the approval power is not simply an "up or down" vote, but rather includes the power to amend the policy); *N.C. State Ports Auth. v. S. Felt Corp.*, 1 N.C. App. 231, 233, 161 S.E.2d 47, 49 (1968) (confirming the importance of the approval power).

411. N.C. GEN. STAT. § 130A-145(c) (2003).

412. While rare, MCD can be passed to humans. *See WORKING GROUP, supra* note 18, at 36. The power to quarantine animals infected with an agent that has the potential to be passed to humans was granted to the state health director in 2002. Act of Oct. 3, 2002, ch. 179, sec. 1, § 130A-475, 2002 N.C. Sess. Laws 803, 803–05 (codified as amended at N.C. GEN. STAT. § 130A-475) (creating new powers for health director to respond to terrorist threats). Therefore, the statute empowers the health director to quarantine a case of MCD without receiving the Governor's approval. Whether the General Assembly contemplated the exercise of this power in response to MCD, whether the General Assembly intended to create dissimilar procedures for the state health director and veterinarian to follow in response to MCD, and whether different procedures have a legal justification or policy rationale are beyond the scope of this Comment.

413. This Comment does not address whether the differentiation is appropriate. *See supra* note 412.

could slightly diminish the speed of the response. At the very least, contacting the Governor or his designee is one more conversation the state veterinarian must have before, for example, implementing the quarantine. However, the Governor's ability to designate an official to respond on behalf of the Governor greatly reduces the potential that the approval requirement could significantly delay implementation. Nothing in the legislation prevents the Governor from designating someone in the Department of Agriculture who, presumably, could be easily contacted by the state veterinarian.⁴¹⁴

Requiring approval improves the accuracy of the determination. The Governor or his designee serves as an additional perspective on the situation—either confirming or challenging the opinion of the state veterinarian. Further, the act of justifying the determination in order to receive approval will force the state veterinarian to actually articulate the rationale and evidence supporting the choice. Both additional elements will decrease the chances that an incorrect determination is made.

Finally, requiring approval increases accountability. The police powers associated with a strong disease containment policy are exceptional. Making an elected official, in part, responsible for the determination will likely add other factors to the calculation. The Governor will likely consider individual liberty and broader principles such as the proper role and power of government, as opposed to basing the decision solely on whether the policy would contain the disease. Moreover, the people of North Carolina will be able to directly respond to the exercise of power through the gubernatorial election instead of having to attempt to indirectly regulate the appointed state veterinarian.

The state veterinarian is authorized to exercise great police power once the Governor approves her threat determination. Given that the threat from MCD or FMD is primarily economic and not related to human health, the difference between the veterinarian's power and health director's power—one is required to receive approval, the other is not—is justified. The approval provision slows the executive branch's reaction to the disease, but only slightly. It increases both the accountability associated with the process and its accuracy. The economic threat posed by a contagious animal disease, like a human health crisis, is great and requires a rapid response. Nevertheless, the legislative decision to require approval, rather than just consultation, strikes the appropriate balance between each factor.

414. Act of Apr. 4, 2001, ch. 12, 2001 Sess. Laws 14 (codified in scattered sections of N.C. GEN. STAT. § 106).

VII. THE SUNSET PROVISION

The expiration date of the powers authorized in the 2001 legislation was April 2003. The day before it was set to expire, the authorization was extended until October 2005.⁴¹⁵ The sunset provision weakened the 2001 legislation by adding an artificial endpoint to the protection created in S.B. 779, when the threat posed by MCD and FMD has no foreseeable endpoint. In addition, any informal plan to reauthorize the legislation every two years runs unnecessary risks.

A. *Two-Year Sunset Provision*

The simple purpose of the sunset provision is to mandate the expiration of the authorized powers on a certain date. In the case of the powers to contain contagious animal diseases granted in S.B. 779, the expiration date was roughly two years after the act became law.⁴¹⁶ The sunset provision was added to and removed from both versions of the bill numerous times.⁴¹⁷ The justification for the sunset provision is only mentioned once in the bill's legislative history.⁴¹⁸ There was concern that the legislation might not pass in the House without the sunset provision.⁴¹⁹ This concern demonstrates the two motivations for supporting the provision. First, a sunset sets a firm limit on the power of the government. For those legislators concerned that S.B. 779 authorized too much police power, the sunset provision guaranteed that, at least temporally, the power was finite. This guarantee made the bill much more palpable.⁴²⁰ The second motivation is the political result of the first: legislators may have supported the sunset provision because without it, the bill may not have passed in any form—a conclusion presumably unacceptable to most members.

Regardless of its political value, the sunset provision weakens the protections offered by S.B. 779. The powers granted to the state veterinarian in 2001 were appropriate given the threat posed by contagious animal diseases, namely economic and health disasters caused by FMD and MCD outbreaks.⁴²¹ These diseases continue to pose a significant threat because they appear without warning, especially in the case of MCD,

415. Act of Mar. 24, 2003, ch. 6, 2003 N.C. Sess. Laws 3.

416. Act of Apr. 4, 2001, ch. 12, § 11, 2001 Sess. Laws 14, 21.

417. See *supra* Part II.A (discussing legislative history).

418. *Control Foot & Mouth/Animal Disease Outbreaks: Hearing on S.B. 779 Before the House Agriculture Committee*, 2001 Gen. Assem., Reg. Sess. (N.C. 2001) (Apr. 4, 2001 minutes).

419. *Id.*

420. See *id.* (noting the opinion of some legislators at the time that the House may not pass the bill without a sunset provision).

421. See *supra* Part I.C–E.

which is particularly difficult to diagnose,⁴²² and spread rapidly.⁴²³ The appearance of MCD in the United States in 2003 surprised the agriculture industry.⁴²⁴ An FMD case discovered in North Carolina would certainly deliver a comparable surprise. A case is just as likely to be discovered, and a strong executive response just as needed, after the expiration date on any legislation as prior to the expiration date. An arbitrary expiration date, as long as the threat continues, weakens the protection established in S.B. 779 by capping it. Having no rational relationship to the FMD or MCD threat, the expiration date simply notes the day on which North Carolina will leave its agriculture industry to face the threat without being able to count on the strong governmental response authorized by S.B. 779.

In addition, the triggering provision discussed earlier⁴²⁵ provides a sufficient check on the police power vested in the veterinarian. The new powers are only operative under specific conditions and only with the approval of the Governor, an official directly accountable to the people for his decision. The political check on the Governor functions as a check on the arbitrary exercise of the police powers, but leaves the powers available to meet an emergency. A sunset provision, even if intended to limit the police power of government, represents a decision to leave North Carolina's agriculture industry potentially unguarded in the face of a still viable threat.

B. *Informal Reauthorization Plan*

The state veterinarian's powers were reauthorized the day before they expired, March 31, 2003.⁴²⁶ Again leaving aside the political element, the reauthorization signals one of two intentions. On one hand, the General Assembly and Governor contemplate an informal system under which this issue is revisited and *reapproved* every two years. This approach has almost the same practical consequences as removing the sunset provision: there would be no gap in the veterinarian's authority unless the General Assembly or Governor fails to reapprove the measures. If the General Assembly and the Governor intend to perpetually extend the sunset to provide constant authorization, the better policy approach would be the removal of the sunset provision, which would require legislative action (revoking the power) instead of simple non-action (not considering a bill to extend the sunset) to discontinue the veterinarian's authority. As the threat posed by MCD, FMD, and other contagious animal diseases falls from the

422. N.C. CHART, *supra* note 18.

423. *Id.*

424. See *supra* note 3 and accompanying text.

425. See Part VI.

426. Act of Mar. 24, 2003, ch. 6, § 2, 2003 N.C. Sess. Laws 3, 4.

limelight and the focus of the agriculture industry turns to a new issue, elected leaders will be more likely to rank the reauthorization of the 2001 power behind other priorities. Eliminating the sunset provision—and by doing so requiring action rather than inaction to change the policy—makes leaving the powers of S.B. 779 in place the default position and leaves the agriculture industry protected even if reauthorization of the state veterinarian's authority fails to remain high on the legislative priority list.

On the other hand, the intention of the General Assembly and the Governor could be to revisit and *reconsider* the issue every two years, which leaves only two possible results. The General Assembly or Governor (through the veto power) could fail to extend the sunset provision, and thereby increase the vulnerability of the state's agriculture industry. Or, the sunset provision could be extended. The extension of the sunset functions the same in the short-term as the removal of the sunset provision. There is no long-term since the same issue is raised again in two years.

The counterargument to this position emphasizes the existence of choice—the General Assembly and the Governor, and through them the people, every two years may reassess the situation and “choose” to reauthorize the state veterinarian. The choice, however, is really a Hobson's choice: one of the two options leaves the state economy unacceptably open to an MCD or FMD outbreak. The sunset provision, by forcing this choice and creating the potential that North Carolina could be left unprepared to protect its agriculture industry, decreases the protection crafted in S.B. 779. Consequently, the sunset provision should be removed.

VIII. RECOMMENDATIONS AND FURTHER CONSIDERATION

This Comment has noted a few distinct aspects of the contagious animal disease legislation that deserve further legislative consideration. Primarily, the sunset provision should be removed. The constant threat to the state's livestock requires a state veterinarian continuously empowered to contain an outbreak. In addition, the General Assembly should articulate a clear definition of “quarantine,” specifically, whether the state veterinarian has the power to control the movement of people as well as animals. The “triggering” provision should also be revisited. The language currently requires the Governor to approve the determination of the threat made by the state veterinarian.⁴²⁷ It is not clear whether the General Assembly's intention was that the Governor would be required to approve the exercise of the powers. Finally, the relationship between the state

427. See, e.g., N.C. GEN. STAT. § 106-399.5 (2003) (requiring approval of determination).

health director's quarantine power and the state veterinarian's quarantine power should be reconsidered. In particular, the state health director is authorized to quarantine animals *without the Governor's approval* if the animal disease threatens human health.⁴²⁸ In the case of MCD, this would allow the state health director to quarantine the animal without approval, but the state veterinarian would have to wait for approval.

CONCLUSION

The first American cow infected with MCD and a recent American death attributed to MCD have again brought the issue of contagious animal diseases to the forefront of public debate. Because of the state's large cattle and pork industries, protecting livestock from a contagious animal disease is a critical public policy issue facing North Carolina. The current containment policy, enacted in 2001 in response to the FMD outbreak in the United Kingdom and fear of a similar outbreak in North Carolina, authorizes the state veterinarian to quarantine large areas of the state, conduct warrantless searches and seizures, and destroy potentially infected animals without notice. Each power, while broader than those formerly vested in the veterinarian, is consistent with the U.S. Constitution and with other North Carolina statutes. Before the veterinarian may exercise these powers, however, the Governor must approve the veterinarian's determination that an "imminent threat" exists. This check on the power granted to the veterinarian further protects individual rights and is an appropriate addition to the statute. The powers also have a sunset provision. The current expiration date is October 2005.⁴²⁹ The sunset provision is an unnecessary aspect of the statute. As demonstrated by the 2003 MCD discovery, livestock are not, and presumably will not be in the foreseeable future, absolutely safe from contagious animal diseases. Accordingly, it is currently impossible to revoke the powers granted by S.B. 779 without vesting the power in another official or compromising safety. The North Carolina General Assembly authorized the state veterinarian to exercise extraordinary police power. Yet, because an outbreak of FMD, MCD, or another contagious animal disease could deliver a catastrophic blow to the livestock industry in North Carolina and North Carolina's economy as a whole, S.B. 779 is defensible.

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428. *Id.* § 130A-145(c).

429. Act of Mar. 24, 2003, ch. 6, § 1, 2003 N.C. Sess. Laws 3, 3.